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# Bowers v. Hardwick: A Giant Step Back for Privacy Rights

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# **BOWERS v. HARDWICK: A GIANT STEP BACK FOR PRIVACY RIGHTS**

## **I. INTRODUCTION**

"Socrates and Plato made no bones about their homosexuality. . . . Virgil and Horace wrote erotic poems about men; Michaelangelo's great love sonnets were addressed to young men, and so were Shakespeare's. There seems to be evidence that Alexander the Great was homosexual and Julius Caesar certainly was . . . . So were Charles XII of Sweden and Frederick the Great. Several English monarchs have been homosexual . . . . About others— Marlowe, Tchaikovsky, Whitman, Kitchener, Rimbaud, Verlaine, Proust, Gide, Wilde, and many more—there is no reasonable doubt [about their homosexuality]."¹

Homosexuality has been part of society for centuries. However, it is only recently, in *Bowers v. Hardwick*,² that the United States Supreme Court addressed the issue of whether a state statute which criminalizes sodomy³ violated the Constitution of the United States. The Court held that such a statute, as applied to homosexual sodomy, did not violate the Constitution.⁴

This Note will analyze the majority's reasoning and discuss how the majority incorrectly interpreted precedent to reach its holding in this case. This Note will also analyze the dissenting opinions and explain how the dissent correctly interpreted precedent to reach the opposite conclusion. Further, the author will supply an alternative rationale and explain why the Georgia sodomy statute, as applied, violates the equal protection clause of the United States Constitution,⁵ an argument not addressed by either the majority or the dissent.

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1. G. GEIS, NOT THE LAW'S BUSINESS 24 (1979) (quoting B. MAGEE, ONE IN TWENTY: A STUDY OF HOMOSEXUALITY IN MEN AND WOMEN 46 (1966)).

2. 106 S. Ct. 2841 (1986).

3. GA. CODE ANN. § 16-6-2(a) (1984). The statute provides: "A person commits the offense of sodomy when he performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another . . . ." *Id.*

4. *Bowers*, 106 S. Ct. at 2843-44.

5. U.S. CONST. amend. XIV, § 1. The equal protection clause of the fourteenth amendment provides that "[n]o State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws." *Id.*

## II. STATEMENT OF THE CASE

A. *The Facts*

In August 1982, Michael Hardwick, an adult male homosexual, was arrested when the police found him committing the act of sodomy with another adult male in the privacy of his own bedroom.<sup>6</sup> The arrest was based on a violation of section 16-6-2 of the Georgia Code which criminalizes such behavior.<sup>7</sup> The district attorney decided not to present the matter to the grand jury unless further evidence developed.<sup>8</sup> Hardwick, fearing imminent danger of future arrest due to his continued homosexual activity, filed suit in federal district court for declaratory judgment. He alleged that the Georgia statute was unconstitutional as applied to consensual sodomy.<sup>9</sup>

John and Mary Doe, a married couple, joined Hardwick as plaintiffs; they too feared arrest since the statute as worded applied to heterosexuals as well as homosexuals.<sup>10</sup> The district court held that the Does did not have standing because they had not sustained direct injury, nor were they in immediate danger of sustaining injury.<sup>11</sup>

Relying on *Doe v. Commonwealth's Attorney*,<sup>12</sup> the district court granted defendant's motion to dismiss Hardwick's action for failure to state a claim.<sup>13</sup> Hardwick then appealed the decision to the Eleventh Circuit Court of Appeals.<sup>14</sup>

Since *Doe* had been undermined by later decisions, the Eleventh Circuit Court of Appeals reversed the lower court, holding that the summary affirmance in *Doe* did not require that Hardwick's suit be dismissed for failure to state a claim.<sup>15</sup> The court held that the Georgia statute

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6. *Bowers v. Hardwick*, 106 S. Ct. 2841, 2842 (1986). The case did not discuss why the police were in Hardwick's apartment. However, an article discussing *Bowers* revealed that the Georgia police went to Hardwick's home to serve a warrant for his arrest regarding a minor liquor offense. The police officer was invited in by a house guest, whereupon the officer discovered Hardwick having sexual relations in his bedroom with another man. Robinson, *Sodomy and the Supreme Court*, COMMENTARY, Oct. 1986, at 57, 58.

7. See *supra* note 3.

8. *Bowers*, 106 S. Ct. at 2842.

9. *Id.*

10. *Id.* at 2842 n.2.

11. *Id.*

12. 403 F. Supp. 1199 (E.D. Va. 1975), *aff'd*, 425 U.S. 901 (1976) (district court dismissed male homosexual's challenge of Virginia sodomy law; affirmed by the Supreme Court by summary judgment).

13. *Bowers*, 106 S. Ct. at 2842.

14. *Hardwick v. Bowers*, 760 F.2d 1202 (11th Cir. 1985), *rev'd*, 106 S. Ct. 2841 (1986).

15. *Id.* at 1210. The court was referring to *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Stanley v. Georgia*, 394 U.S. 557 (1969); and *Griswold v. Connecticut*, 381 U.S. 479 (1965). See *infra* text accompanying notes 104-13 and 152-55 for a discussion of *Eisenstadt*; *infra* text

violated Hardwick's fundamental right of privacy under the ninth amendment<sup>16</sup> and the due process clause of the fourteenth amendment,<sup>17</sup> since homosexuality is a private intimate association beyond the reach of state regulation.<sup>18</sup>

The case was then remanded for trial.<sup>19</sup> Michael Bowers, the Attorney General of Georgia, petitioned for certiorari, which was granted by the United States Supreme Court.<sup>20</sup> The Court reversed the Eleventh Circuit opinion, and held the Georgia statute unconstitutional.<sup>21</sup>

## B. The Court's Reasoning

### 1. The majority opinions

#### a. Justice White

Justice White, writing for the majority, stated that the issue in this case was whether the Constitution conferred upon homosexuals a fundamental right to engage in sodomy.<sup>22</sup> He determined that since the right to engage in sodomy was not fundamental,<sup>23</sup> the right of privacy under the Constitution<sup>24</sup> did not extend to consensual homosexual sodomy.<sup>25</sup> He cited several cases to illustrate that the right of privacy had been extended to areas such as education and child rearing,<sup>26</sup> family relationships,<sup>27</sup> procreation,<sup>28</sup> marriage,<sup>29</sup> contraception<sup>30</sup> and abortion.<sup>31</sup> Jus-

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accompanying notes 215-52 for a discussion of *Stanley*; and *infra* text accompanying notes 145-53 for a discussion of *Griswold*.

16. *Hardwick*, 760 F.2d at 1212. The ninth amendment provides that "[t]he enumeration of the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." U.S. CONST. amend. IX. See *infra* note 152 for a discussion of how the ninth amendment is related to the right of privacy.

17. *Hardwick*, 760 F.2d at 1212. The due process clause of the fourteenth amendment provides that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. XIV, § 1. See *infra* note 152.

18. *Hardwick*, 760 F.2d at 1212.

19. *Id.* at 1213.

20. 106 S. Ct. 342 (1985).

21. *Bowers*, 106 S. Ct. at 2843.

22. *Bowers v. Hardwick*, 106 S. Ct. 2841 (1986). See *infra* text accompanying notes 180-81 and 237-38 for an analysis of how the Court framed the issue.

23. *Bowers*, 106 S. Ct. at 2844.

24. See *infra* text accompanying notes 145-67 for a discussion of the history of the right to privacy.

25. *Bowers*, 106 S. Ct. at 2843-44.

26. *Id.* at 2843 (citing *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (Oregon law requiring all "normal" children from eight to sixteen years of age to attend public school violates due process, unless it has a reasonable relationship to some purpose within the competency of the state); *Meyer v. Nebraska*, 262 U.S. 390 (1923) (state law proscribing a teacher from teaching in a language other than English violates due process)).

27. *Id.* (citing *Prince v. Massachusetts*, 321 U.S. 158 (1944) (statute providing that no

tice White stated that none of these areas resembled homosexual sodomy.<sup>32</sup> He asserted that behavior implicates the protection of the Constitution only where it is a fundamental liberty which is "‘implicit in the concept of ordered liberty,’ such that ‘neither liberty, nor justice would exist if [they] were sacrificed,’"<sup>33</sup> or a liberty which is "‘deeply rooted in this Nation’s history and tradition.’"<sup>34</sup>

Justice White found it "obvious"<sup>35</sup> that since the right of adult homosexuals to engage in consensual sexual relations in the privacy of their own home did not fit within either of the above definitions, it was not a fundamental right. He therefore concluded that the right of privacy could not be extended to protect such behavior.<sup>36</sup>

Justice White also relied on history to justify the majority’s holding. He stated that since most states had statutes forbidding sodomy at the time the fourteenth amendment was ratified, and since "proscriptions against that conduct have ancient roots,"<sup>37</sup> it is "at best, *facetious*" to claim that the right of privacy should extend to consensual sodomy.<sup>38</sup>

Justice White rationalized the holding by explaining that it is not the Court’s job to "discover" new fundamental rights, since this would result

minor shall sell newspapers, magazines, or other periodicals upon the streets is constitutional; state can regulate behavior of children more strictly than adults)).

28. *Id.* (citing *Skinner v. Oklahoma*, 316 U.S. 535 (1942) (statute requiring sterilization of habitual criminals violates equal protection)).

29. *Id.* (citing *Loving v. Virginia*, 388 U.S. 1 (1967) (statute proscribing marriage based on racial classifications violates due process)). See *infra* text accompanying notes 93-98 for a discussion of *Loving*.

30. *Bowers*, 106 S. Ct. at 2843-44 (citing *Carey v. Population Servs. Int’l*, 431 U.S. 678 (1977) (statute prohibiting the sale of contraceptives to those under sixteen years of age violates constitutional right of privacy); *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (statute making it a felony to furnish unmarried persons with contraception is unconstitutional); and *Griswold v. Connecticut*, 381 U.S. 479 (1965) (statute outlawing use of contraceptives violates due process based on right of privacy)).

31. *Id.* (citing *Roe v. Wade*, 410 U.S. 113 (1973) (a woman’s right to choose to have an abortion early in pregnancy is protected by the right of privacy under the due process clause of the fourteenth amendment)). See *infra* text accompanying notes 89-92 and 160-67 for a discussion of *Roe*.

32. *Bowers*, 106 S. Ct. at 2844.

33. *Id.* (quoting *Palko v. Connecticut*, 302 U.S. 319, 325-26 (1937)).

34. *Id.* (quoting *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977)).

35. *Id.* (emphasis added).

36. *Id.* at 2846.

37. *Id.* at 2844. The states which had sodomy statutes in effect in 1868 were: Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Illinois, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New York, North Carolina, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Vermont, Virginia, West Virginia and Wisconsin. *Id.* at 2845 n.6.

38. *Id.* at 2845-46 (emphasis added).

in "judge-made constitutional law having little or no cognizable roots in the language . . . of the Constitution."<sup>39</sup> Therefore, he emphasized how important it is for the Court to resist expanding the fourteenth amendment's substantive reach. In his opinion, extending the right of privacy to include consensual homosexual sodomy would overstep the Court's authority, since there was no constitutional authority to do so.<sup>40</sup>

When confronted with the argument that the right of privacy should extend in this case because the activity occurred in the privacy of Hardwick's home, Justice White distinguished Hardwick's case from *Stanley v. Georgia*.<sup>41</sup> In *Stanley*, the Court held it unconstitutional to criminalize an individual's possession of obscene material in the privacy of the home.<sup>42</sup> Justice White stated that the *Stanley* decision was firmly grounded in the first amendment, finding it unpersuasive with respect to the right of privacy.<sup>43</sup> Justice White also felt that consensual homosexual sodomy should not be protected under the right of privacy because it would be difficult to draw the line between this behavior and behavior such as adultery, incest or other sexual crimes.<sup>44</sup>

Finally, Justice White justified the majority's holding by stating that sentiments held by the majority of the population regarding the morality of homosexual sodomy provided a sufficient rationale to support Georgia's statute.<sup>45</sup> He stated, "[Hardwick] insists that the majority sentiments about morality of homosexuality should be declared inadequate. We do not agree, and are unpersuaded that the sodomy laws of some 25 States should be invalidated on this basis."<sup>46</sup> He concluded that the Georgia sodomy statute, as applied to homosexuality, did not violate the Constitution.

*b. Chief Justice Burger*

Chief Justice Burger, in his concurring opinion, supported the holding of the Court by relying on the history of religious views against homosexual sodomy.<sup>47</sup> He stated, "[c]ondemnation of [homosexual

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39. *Id.* at 2846.

40. *Id.*

41. 394 U.S. 557 (1969).

42. *Id.* at 568. The case is significant because it distinguishes between regulating the possession of obscene material in the privacy of one's home and regulating obscenity in public. See *infra* text accompanying notes 215-50 & 234-37.

43. *Bowers*, 106 S. Ct. at 2846.

44. *Id.*

45. *Id.*

46. *Id.* at 2846 (footnote omitted).

47. *Id.* at 2847 (Burger, C.J., concurring).

conduct] is firmly rooted in Judaeo-Christian moral and ethical standards."<sup>48</sup> He also stressed his agreement with Justice White that there is no such thing as a fundamental right to commit homosexual sodomy.<sup>49</sup>

*c. Justice Powell*

In his concurring opinion, Justice Powell also agreed that there is no fundamental right to engage in homosexual sodomy.<sup>50</sup> However, he went on to state that Hardwick may be protected under the eighth amendment of the Constitution.<sup>51</sup> He noted that the Georgia statute authorized punishment for up to twenty years in prison for a single act of sodomy. Since this punishment was also authorized for serious felonies such as aggravated battery, first degree arson and robbery, Justice Powell reasoned that a prison sentence for sodomy "would create a serious eighth amendment issue."<sup>52</sup> He concluded that the eighth amendment issue was not before the Court because Hardwick had not been convicted and sentenced; nor had he raised the eighth amendment issue.<sup>53</sup>

2. The dissent

*a. Justice Blackmun*

Justice Blackmun concluded that the Georgia sodomy statute violated the Constitution.<sup>54</sup> He began his analysis by criticizing the majority's characterization of the issue, stating that "[t]his case is no more about 'a fundamental right to engage in homosexual sodomy' . . . than *Stanley v. Georgia* . . . was about a fundamental right to watch obscene movies . . . ."<sup>55</sup> He further criticized the majority holding by concluding that a long history of a statute's existence,<sup>56</sup> the fact that certain religious groups condemn sodomy,<sup>57</sup> or a belief held by a majority of citizens that homosexual sodomy is immoral<sup>58</sup> did not provide an adequate justification for the Georgia sodomy statute.

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48. *Id.* (Burger, C.J., concurring).

49. *Id.* (Burger, C.J., concurring).

50. *Id.* (Powell, J., concurring).

51. *Id.* (Powell, J., concurring). The eighth amendment provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted." U.S. CONST. amend. VIII.

52. *Bowers*, 106 S. Ct. at 2847 (Powell, J., concurring).

53. *Id.* at 2848 (Powell, J., concurring).

54. *Id.* at 2856 (Blackmun, J., dissenting).

55. *Id.* at 2848 (Blackmun, J., dissenting) (quoting *Bowers v. Hardwick*, 106 S. Ct. 2841, 2844 (1986) (majority opinion)).

56. *Id.* (Blackmun, J., dissenting).

57. *Id.* at 2854-55 (Blackmun, J., dissenting).

58. *Id.* at 2855 (Blackmun, J., dissenting).

Justice Blackmun stated that the majority should have considered the eighth amendment, the ninth amendment and the equal protection clause of the fourteenth amendment.<sup>59</sup> He observed that since this case was before the Court on a motion to dismiss for failure to state a claim, the Court had a duty to determine if the allegations provided for relief on any possible theory.<sup>60</sup> Justice Blackmun chose not to address the eighth amendment or the equal protection clause because he believed Hardwick had stated a cognizable claim that the sodomy statute "interfere[d] with constitutionally protected interests in privacy and freedom of intimate association."<sup>61</sup>

Justice Blackmun also criticized the majority for focusing on homosexual sodomy<sup>62</sup> since, as the statute was worded, the gender of those who engaged in sodomy was irrelevant as a matter of state law.<sup>63</sup>

Justice Blackmun concluded that the right of privacy regarding an individual's right to make certain decisions does extend to consensual sodomy. He argued that despite the fact that this behavior did not resemble childbearing or marriage,<sup>64</sup> an analysis of the policies underlying the right of privacy support this conclusion. He stated, "[w]e protect those rights not because they contribute, in some direct and material way to the general public welfare, but because they form so central a part of an individual's life . . . the '*moral fact that a person belongs to himself and not others nor to society as a whole.*'"<sup>65</sup> He stressed the fact that sexual intimacy is a key relationship of human existence which contributes to community welfare, and thus is integral to one's right of privacy.<sup>66</sup>

Justice Blackmun also stated that the right of privacy implicit in the fourth amendment regarding special protection of the home should also

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59. *Id.* at 2849 (Blackmun, J., dissenting). See *supra* note 51 for the language of the eighth amendment, *supra* note 16 for the language of the ninth amendment, and *supra* note 5 for the language of the equal protection clause of the fourteenth amendment.

60. *Bowers*, 106 S. Ct. at 2849 (Blackmun, J., dissenting).

61. *Id.* at 2849-50 (Blackmun, J., dissenting).

62. *Id.* at 2849 (Blackmun, J., dissenting).

63. *Id.* (Blackmun, J., dissenting). See *supra* note 3. Justice Blackmun stated that a claim under the equal protection clause could well be available since Georgia exclusively stressed its interest in prosecuting only homosexual sodomy despite the fact that the statute itself is gender-neutral. For Justice Blackmun, this raised a serious question of discriminatory enforcement. *Bowers*, 106 S. Ct. at 2850 n.2. (Blackmun, J., dissenting). See *infra* text accompanying notes 253-347 for an equal protection analysis.

64. *Bowers*, 106 S. Ct. at 2851 (Blackmun, J., dissenting).

65. *Id.* (Blackmun, J., dissenting) (emphasis added) (quoting *Thornburgh v. American College of Obstetricians & Gynecologists*, 106 S. Ct. 2169, 2187 n.5 (Stevens, J., concurring) (1986)).

66. *Id.* (Blackmun, J., dissenting).



extend to consensual sodomy.<sup>67</sup> He believed that the majority incorrectly interpreted *Stanley v. Georgia* by not recognizing its significance with respect to the protection of private behavior within the home.<sup>68</sup> He noted that, "the right of an individual to conduct intimate relationships in the intimacy of his or her own home seems to me to be the heart of the Constitution's protection of privacy."<sup>69</sup> He further criticized the majority for comparing consensual sexual activity with possession of firearms or stolen goods in the home.<sup>70</sup>

In Justice Blackmun's conclusion, he stated that depriving individuals of the right to make decisions regarding their intimate relationships poses a severe threat to values deeply rooted in America's history.<sup>71</sup>

. b. *Justice Stevens*

In his dissenting opinion, Justice Stevens discussed two issues: (1) whether a state may totally prohibit consensual sodomy with a neutral law, applying it to heterosexuals—married or single—and to homosexuals; and if not, (2) whether the state may save the statute by enforcing it exclusively against homosexuals.<sup>72</sup>

Justice Stevens stated that the Georgia statute could not be enforced as written because it applied to married heterosexuals.<sup>73</sup> Relying on *Griswold v. Connecticut*<sup>74</sup> and *Eisenstadt v. Baird*,<sup>75</sup> he concluded that a state may not prohibit sodomy within "the sacred precincts of marital bedrooms."<sup>76</sup>

He then reasoned that Georgia must carry the burden of justifying selective application because homosexuals have the same liberty interest under the fourteenth amendment as all other citizens of Georgia.<sup>77</sup> Justice Stevens stated that intrusion into the private conduct of heterosexuals or homosexuals equally burdens an individual's liberty interest.<sup>78</sup> He stated that unless Georgia could justify selective application of the sod-

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67. *Id.* at 2852 (Blackmun, J., dissenting).

68. *Id.* at 2852-53 (Blackmun, J., dissenting) (citing *Stanley v. Georgia*, 394 U.S. 557 (1969)). See *supra* note 41.

69. *Bowers*, 106 S. Ct. at 2853 (Blackmun, J., dissenting).

70. *Id.* (Blackmun, J., dissenting).

71. *Id.* at 2856 (Blackmun, J., dissenting).

72. *Id.* at 2857 (Stevens, J., dissenting).

73. *Id.* at 2858 (Stevens, J., dissenting).

74. 381 U.S. 479 (1965). See *infra* text accompanying notes 145-53.

75. 405 U.S. 438 (1972). See *infra* text accompanying notes 104-13 & 154-55.

76. *Bowers*, 106 S. Ct. at 2858 (Stevens, J., dissenting) (quoting *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965)).

77. *Id.* (Stevens, J., dissenting).

78. *Id.* (Stevens, J., dissenting).

omy statute, the statute violated the due process clause of the fourteenth amendment.<sup>79</sup>

Justice Stevens concluded that the sodomy statute violated Hardwick's liberty interest under the due process clause.<sup>80</sup> He reasoned that the statute cannot stand if selectively applied to homosexuals, since Georgia had not identified a neutral, legitimate state interest to justify selective application.<sup>81</sup> He criticized the majority's view that Georgia had justified selective application based on the notion that the Georgia electorate viewed homosexual sodomy as immoral.<sup>82</sup> He pointed out that contrary to this notion, the Georgia electorate must have believed that all acts of sodomy were immoral, since the statute itself did not single out homosexuals.<sup>83</sup>

Justice Stevens further concluded that support for a legitimate state interest was weakened by the fact that the statute had not been enforced for decades.<sup>84</sup> He believed that Hardwick alleged a constitutional claim sufficient to withstand a motion to dismiss.<sup>85</sup>

### III. ANALYSIS

The following analysis will examine why the length of time a statute has existed, morality in the abstract, or a religious purpose is not a sufficient rationale to justify upholding a statute as constitutional. Further, the analysis will examine why the constitutional right of privacy should protect consensual adult homosexual sodomy occurring in the privacy of the home, and why the Georgia sodomy statute, as applied, violates equal protection.

#### A. *History, Morality and Religion: Insufficient Bases for Constitutional Analysis*

##### 1. History

A long history of a statute's existence is an insufficient rationale for concluding that the statute is constitutional.<sup>86</sup> Therefore, Justice White's reliance on the long history of sodomy statutes was an inappropriate ba-

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79. *Id.* at 2859 (Stevens, J., dissenting). See *supra* note 17 for the language of the due process clause of the fourteenth amendment.

80. *Id.* (Stevens, J., dissenting).

81. *Id.* at 2858-59 (Stevens, J., dissenting).

82. *Id.* (Stevens, J., dissenting).

83. *Id.* at 2859 (Stevens, J., dissenting).

84. *Id.* (Stevens, J., dissenting).

85. *Id.* (Stevens, J., dissenting) (footnote omitted).

86. See *infra* text accompanying notes 89-100.

sis for concluding that Georgia's sodomy statute was constitutional.<sup>87</sup> Justice White's reasoning was circular and unconvincing; a statute is not constitutional merely because it has existed for a long period of time. Rather, a statute is constitutional because it does not violate a clause of the Constitution. As Justice Blackmun pointed out in his dissent, "it is revolting if . . . the rule simply persists from blind imitation of the past."<sup>88</sup> If a long history of a statute's existence could justify upholding a statute as constitutional, many laws found in the past to be unconstitutional would still exist.

One example of the illogic of Justice White's assertion can be seen in the Court's treatment of abortion statutes. Like sodomy statutes, statutes proscribing abortion have existed for centuries. At the time the fourteenth amendment was passed, thirty-six states had statutes criminalizing abortion.<sup>89</sup> However, when, in *Roe v. Wade*,<sup>90</sup> a pregnant woman brought a class action suit challenging Texas abortion statutes, Justice Blackmun, writing for the majority, expressly rejected the notion that a statute's history can dictate whether it is constitutional. Contrary to Justice White's view in *Bowers*, Justice Blackmun stated:

Our task, of course, is to resolve the issue by constitutional measurement, free of emotion and predilection.

. . . . .  
 . . . "[The Constitution] is made for people of fundamentally differing views, and the accident of our finding certain opinions

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87. See *supra* text accompanying notes 37-38. In *Bowers*, both Justice White and Chief Justice Burger referred to the existence of sodomy statutes in the common law of England to support their view that the long history of sodomy statutes was a sufficient basis for upholding the Georgia statute. *Bowers v. Hardwick*, 106 S. Ct. 2841, 2844-45 n.5, 2847 (1986). It is true that even as late as the early 1960's judges in England felt that it was the law's business to enforce morality. This view was known as "legal moralism." H.L.A. HART, *LAW, LIBERTY, AND MORALITY* 6 (1963). However, both Justice White and Chief Justice Burger failed to acknowledge that England ended criminalization of consensual adult homosexual sodomy by repealing its sodomy statutes in 1966. G. GEIS, *supra* note 1, at 45. England's repeal of its sodomy laws was based on a report by a committee appointed by the British government. *Id.* at 42; see also H.L.A. HART, *supra*, at 13. The committee was headed by Sir John Wolfenden, and is therefore known as the Wolfenden Committee. G. GEIS, *supra* note 1, at 42. The Wolfenden Committee stated in its report that "[t]here must remain a realm of private morality and immorality which is, in brief and crude terms, not the law's business." H.L.A. HART, *supra*, at 14-15 (quoting GREAT BRITAIN, COMMITTEE ON HOMOSEXUAL OFFENSES AND PROSTITUTION 24 (Cmd. 247) (1957)); see also G. GEIS, *supra* note 1, at 42. Thus, the British government's mandate of "legal moralism" ended in 1966.

88. *Bowers*, 106 S. Ct. at 2848 (Blackmun, J., dissenting) (quoting Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897)).

89. *Roe v. Wade*, 410 U.S. 113, 118-19 n.2 (1973). The *Roe* Court pointed out that anti-abortion attitudes go back to ancient Greece. *Id.* at 131-32.

90. 410 U.S. 113 (1973).

natural and familiar or novel and even shocking ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States."<sup>91</sup>

By relying on history to justify constitutional analysis, Justice White ignored precedent such as *Roe* where the Court clearly found that constitutional analysis must go beyond looking at history. In *Roe*, the Court held that *despite* a long history of anti-abortion statutes, such statutes were unconstitutional, since the right to choose an abortion early in pregnancy is protected by the right of privacy under the due process clause of the Constitution.<sup>92</sup>

Another example of a Supreme Court case which held that a statute's long history is not a sufficient rationale for constitutional analysis is *Loving v. Virginia*.<sup>93</sup> There, for the first time, the Court decided whether a statute which prevented marriage based solely on racial classifications violated the equal protection and due process clauses of the fourteenth amendment.<sup>94</sup> Penalties for miscegenation had been common in Virginia since the colonial period, having arisen as an incident to slavery;<sup>95</sup> and, at the time the Court was deciding the case, sixteen states had such statutes, and fifteen years prior, an additional fourteen states had such statutes.<sup>96</sup>

The State of Virginia argued that when the fourteenth amendment was enacted, the framers did not intend for state miscegenation laws to be unconstitutional. Justice Warren, writing for the majority, responded to the state's argument by stating, "although . . . historical sources 'cast some light' they are not sufficient to resolve the problem; '[a]t best, they are inconclusive.'" <sup>97</sup> Again, despite a long history of the existence of anti-miscegenation statutes, the Court held that those statutes were un-

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91. *Id.* at 116-17 (quoting *Lochner v. New York*, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting)).

92. *Id.* at 153. See *infra* text accompanying notes 145-67 for a discussion of the history of the right of privacy. See also *infra* note 150 for a discussion of whether the right of privacy emanates from the fourteenth amendment or the ninth amendment.

93. 388 U.S. 1 (1967).

94. *Id.* at 2. In 1958, two Virginia residents, Mildred Jeter, a black woman, and Richard Loving, a caucasian man, were married in Washington, D.C. They then returned to Virginia to reside. A grand jury indicted the Lovings, charging them with violating Virginia's statute which banned interracial marriages. *Id.* at 3. The Lovings pleaded guilty to the charge, moved to Washington, D.C. and filed a motion in the Virginia state court to set aside their sentence, alleging that the statutes violated the fourteenth amendment. *Id.* By 1964, the motion had still not been decided and the Lovings filed a class action suit in district court to request that the court declare the Virginia antimiscegenation statutes unconstitutional. *Id.*

95. *Id.* at 6.

96. *Id.* at 6 n.5.

97. *Id.* at 9 (quoting *Brown v. Board of Educ.*, 347 U.S. 483, 489 (1954)).

constitutional.<sup>98</sup> Justice White's reliance on the long history of sodomy statutes for his conclusion in *Bowers* that the Georgia statute was constitutional contradicted the reasoning applied in both *Loving v. Virginia* and *Roe v. Wade*, and thus was unfounded.

## 2. Morality

As far back as 1887, the Supreme Court recognized that the police power of the states includes the power to regulate morals.<sup>99</sup> However, the police power itself is not without limitation. In *Panhandle Eastern Pipe Line Co. v. State Highway Commission*,<sup>100</sup> the Court stated, "[t]he police power of a State, while not susceptible of definition with circumstantial precision, must be exercised within a limited ambit and is subordinate to constitutional limitations."<sup>101</sup> The Court has also stated that a state's power to regulate morality alone is not absolute.

There are . . . limits beyond which legislation cannot rightfully go. . . . If . . . a statute purporting to have been enacted to protect the public health, the public morals, or the public safety . . . is a palpable invasion of rights secured by the fundamental law, it is the *duty* of the courts to so adjudge, and thereby give effect to the Constitution.<sup>102</sup>

Therefore, contrary to Justice White's reasoning in *Bowers v. Hardwick*,<sup>103</sup> the Supreme Court's precedent indicates that the Court has been reticent to rely upon morality in the abstract, in the absence of adverse effects upon the individual or society as a whole, as a sufficient basis for

98. *Id.* at 11-12; see also *Brown v. Board of Educ.*, 347 U.S. 483 (1954) (despite a long history of racially based school segregation, the Court held that segregation violated the equal protection clause of the fourteenth amendment).

99. *Mugler v. Kansas*, 123 U.S. 623 (1887) (Court upheld state law prohibiting manufacture and sale of alcoholic beverages, but concluded that not all regulatory statutes are legitimate exercises of state police powers).

100. 294 U.S. 613 (1935) (state statute which authorized the State Highway Commission to order a privately owned pipeline company to relocate certain pipes and telephone lines at its own expense for the alleged purpose of making travel safe, was held unconstitutional even though regulating safety was within the state's police power).

101. *Id.* at 622.

102. *Mugler*, 123 U.S. at 661 (emphasis added). See also Note, *On Privacy: Constitutional Protection for Personal Liberty*, 48 N.Y.U. L. REV. 670 (1973), where the author argued:

Although protection of public morals is within the traditional police power of the state, the legitimacy of this state interest may be questioned, especially when the goal is promotion of "morality" in the abstract, without any examination of how a particular form of conduct adversely affects the individual or society as a whole.

*Id.* at 704.

103. 106 S. Ct. 2841. See *supra* text accompanying notes 45-46.

upholding a statute alleged to violate individual rights under the Constitution.

*Eisenstadt v. Baird*<sup>104</sup> is an example of a fairly recent Supreme Court case which held that regulating morality was an insufficient basis for upholding a statute. That case involved a constitutional challenge of a Massachusetts statute which criminalized the distribution of birth control devices to unmarried persons.<sup>105</sup> Massachusetts argued that the statute protected morals through "regulating the private sexual lives of single persons."<sup>106</sup> The Supreme Court agreed with the court of appeals that morality was the state objective of the legislation because "'contraceptives per se . . . are immoral.'<sup>107</sup> However, rather than holding that the Massachusetts statute was constitutional because it was regulating morality, the Court held that the statute violated the equal protection clause of the Constitution.<sup>108</sup> The Court stated that since the right of privacy<sup>109</sup> protects a married individual's right to use contraception, and unmarried individuals have the same privacy rights as married individuals, the right of privacy also protects an unmarried individual's right to use contraception.<sup>110</sup> Because the right of privacy was violated, morality was not a sufficient basis for upholding the statute.

As is clear from *Eisenstadt*, regulating morality is not a compelling state interest, and therefore is not a sufficient justification to uphold a statute which otherwise violates fundamental rights under the Constitution.<sup>111</sup> The statute in *Eisenstadt* violated the right of privacy and it was therefore irrelevant that the statute was regulating morality.<sup>112</sup> The Supreme Court in *Eisenstadt* did not conclude whether a state has the power to regulate morality in the absence of a demonstrable harm.<sup>113</sup> However, recent Supreme Court decisions indicate the Court's reluctance to rely on morality alone as a sufficient basis to uphold a statute alleged

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104. 405 U.S. 438 (1972).

105. *Id.* at 440-41.

106. *Id.* at 442 (quoting *Sturgis v. Attorney Gen.*, 358 Mass. 37, 41, 260 N.E.2d 687, 690 (1970)).

107. *Id.* at 452 (quoting *Commonwealth v. Baird*, 429 F.2d 1398, 1401-02 (1st Cir. 1970)).

108. *Id.* at 454-55.

109. See *infra* text accompanying notes 145-67 for a discussion of the history of the right of privacy and note 152.

110. *Eisenstadt*, 405 U.S. at 453.

111. See *infra* text accompanying notes 162-67 for a discussion of *Roe*, where the Court concluded that a violation of a fundamental right may only be justified by a compelling state interest.

112. See *infra* text accompanying notes 168-250 for a discussion of why the *Bowers* majority should have held that the Georgia sodomy statute violated the constitutional right of privacy, because the issue of morality was irrelevant in *Bowers*, as it was in *Eisenstadt*.

113. *Eisenstadt*, 405 U.S. at 453.

to violate the Constitution. The cases indicate that there must be harm, or a threat of harm, to the public such that the state has a legitimate interest in regulating the behavior said to be immoral.

A Supreme Court case which supports this view is *Young v. American Mini Theatres, Inc.*<sup>114</sup> There, the Court addressed the constitutionality of a Detroit ordinance which prohibited the operation of an "adult" movie theatre, bookstore or similar establishment within 1000 feet of any other such establishment, or within 500 feet of a residential area.<sup>115</sup> The Court upheld the ordinance but hesitated to rely on morality alone as the state's legitimate interest. The Court stated that the city had a legitimate interest, other than morality, in regulating the quantity of adult movie theatres and bookstores in a given area.<sup>116</sup> The Court concluded that the lack of such regulation would result in demonstrable harm, such as a decrease in property values; an increase in crime such as prostitution; and an increase in residents and businesses moving out of the city.<sup>117</sup>

If the reasoning of the *Bowers* Court was sound, the Court in *Young* could merely have stated that adult theatres were immoral and that the ordinance was valid because the city had the authority to regulate morals. On the contrary, the Court in *Young* relied on legitimate interests other than morality to uphold the city ordinance.

A similar analysis should have been applied in *Bowers v. Hardwick*.<sup>118</sup> Justice White should have held that morality, in the absence of a legitimate state interest such as demonstrable harm, was not a sufficient basis for upholding the Georgia sodomy statute. Hardwick alleged that the Georgia statute violated his constitutional right of privacy.<sup>119</sup> As Justice Stewart stated in his dissenting opinion in *Young*, "[t]he guarantees of the Bill of Rights were designed to protect against precisely such majoritarian limitations on individual liberty."<sup>120</sup> Morality is really nothing more than popular opinion and, as Justice Stewart stated, rights should not be subject to current popular opinion.<sup>121</sup>

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114. 427 U.S. 50 (1976).

115. *Id.* at 52. "Adult" theatre was defined as any theatre exhibiting material which emphasized "[s]pecified [s]exual [a]ctivities" or "[s]pecified [a]natomical [a]reas." *Id.* at 53.

116. *Id.* at 62-63.

117. *Id.* at 55.

118. 106 S. Ct. 2841.

119. *Id.* at 2843.

120. *Young*, 427 U.S. at 86 (Stewart, J., dissenting).

121. *Id.* (Stewart, J., dissenting). "The error here is one of assuming that something exists called 'the method of moral philosophy' whose contours sensitive experts will agree on . . . . That is not the way things are. . . . There simply does not exist a method of moral philosophy." J.H. ELY, *DEMOCRACY AND DISTRUST* 57-58 (1980) (quoting Arnold, *Professor Hart's Theology*, 73 HARV. L. REV. 1298, 1311 (1960)) (emphasis in original).

Justice Blackmun, in his dissent in *Bowers*, expressed the view that morality alone is not a sufficient basis to uphold the sodomy statute. He stated:

This case involves no real interference with the rights of others, for the mere knowledge that other individuals do not adhere to one's value system cannot be a legally cognizable interest . . . let alone an interest that can justify invading the houses, hearts, and minds of citizens who choose to live their lives differently.<sup>122</sup>

As stated above, the Supreme Court has held that morality per se is not a sufficient basis to proscribe contraception for unmarried individuals<sup>123</sup> or for minors,<sup>124</sup> or to regulate adult movie theatres.<sup>125</sup> If Justice White's opinion in *Bowers* had been consistent with precedent, he would have held that morality was not itself a sufficiently legitimate state interest to justify criminalizing consensual adult homosexual sodomy in the privacy of an individual's home. Justice White should have examined the facts in *Bowers* to determine whether a legitimate interest other than morality existed. If no other legitimate interest was found, Justice White should have held that morality, in the abstract, was an insufficient basis to uphold a statute which infringes upon individual rights by criminalizing consensual sodomy occurring in the privacy of the home.

### 3. Religion

The Constitution specifically prohibits legislation to be enacted for the purpose of promoting religious views.<sup>126</sup> The Court's reasoning in *McGowan v. Maryland*<sup>127</sup> demonstrates the rule that a religious purpose cannot support a statute alleged to violate the Constitution. In *McGowan*, a Maryland statute prohibited the sale of merchandise on Sunday. This type of law, known as a "Sunday Closing Law" or a "Sunday Blue Law,"<sup>128</sup> was motivated by religious forces.<sup>129</sup> The *McGowan*

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122. *Bowers*, 106 S. Ct. at 2856 (Blackmun, J., dissenting).

123. See *supra* text accompanying notes 104-13.

124. See *infra* text accompanying notes 156-59.

125. See *supra* text accompanying notes 114-22.

126. See U.S. CONST. amend. I. "Congress shall make no law respecting an establishment of religion . . . ." *Id.* While the first amendment specifically refers to the federal government, over the years the Court has applied to the states through the fourteenth amendment the same restrictions relating to religion. E.L. BARRETT, JR. & W. COHEN, CONSTITUTIONAL LAW 518 (7th ed. 1985); see *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (unlawful for a state law to compel children in public schools to salute the American flag and pledge allegiance).

127. 366 U.S. 420 (1961).

128. *Id.* at 422.



Court stated that religious tenets cannot be the basis for a law; a state may not use its coercive power to aid religion.<sup>130</sup>

A more recent case which held that the promotion of religious views is an insufficient basis for upholding a statute alleged to violate the Constitution is *Stone v. Graham*.<sup>131</sup> In *Stone*, the Court addressed the constitutionality of a Kentucky statute, which required the posting of the Ten Commandments<sup>132</sup> on the wall of every public classroom in the state. The Court applied the following three-part test to determine if this statute was permissible under the establishment clause of the first amendment:<sup>133</sup> (1) the statute must have a secular purpose; (2) the primary purpose must be one that neither advances nor inhibits religion; and (3) the statute must not foster excessive government involvement with religion.<sup>134</sup> The Court held that the Kentucky statute could not pass this test<sup>135</sup> because the statute had no secular legislative purpose. Therefore, the statute was held to be unconstitutional.<sup>136</sup>

Chief Justice Burger, in his concurring opinion in *Bowers*, relied on religious views for support that the Georgia sodomy statute was unconstitutional.<sup>137</sup> As stated above, this type of analysis is specifically proscribed by the Constitution itself.

#### 4. The Model Penal Code, history, morality and religion

As can be seen from the above discussion, much of the basis for the majority's opinion in *Bowers v. Hardwick*<sup>138</sup> is inconsistent with the Court's own precedent. History,<sup>139</sup> morality<sup>140</sup> and religion<sup>141</sup> are insufficient rationales for upholding a statute alleged to be unconstitutional.

Further support for this view can be found in the Model Penal Code.<sup>142</sup> Sexual acts, such as consensual sodomy, which do not involve

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129. *Id.* at 431.

130. The statute in *McGowan* was upheld by the Court because the state was able to prove a secular purpose for the legislation: to provide a uniform day of rest to improve the health and well-being of its citizens. *Id.* at 444-45.

131. 449 U.S. 39 (1980).

132. The Ten Commandments is a sacred text in the Jewish and Christian religions. *Id.* at 41.

133. See *supra* note 126 for the language of the first amendment.

134. *Stone*, 449 U.S. at 40.

135. *Id.* at 42-43.

136. *Id.*

137. *Bowers*, 106 S. Ct. at 2847. See *supra* text accompanying notes 47-48.

138. 106 S. Ct. 2841.

139. See *supra* text accompanying notes 87-98.

140. See *supra* text accompanying notes 99-125.

141. See *supra* text accompanying notes 126-37.

142. MODEL PENAL CODE (Tent. Draft 1955).

violence or imposition upon children, mental incompetents or other dependents are not penalized in the Code.<sup>143</sup> Moreover, the Code clearly provides:

"The Code does not attempt to use the power of the state to enforce *purely moral or religious standards*. We deem it inappropriate for the government to attempt to control behavior that has no substantial significance except as to the morality of the actor . . . . Apart from the question of constitutionality which might be raised against legislation avowedly commanding adherence to a particular religious or moral tenet, it must be recognized . . . that in a heterogeneous community such as ours, different individuals and groups have widely divergent views of the seriousness of various moral derelictions."<sup>144</sup>

Views regarding what behavior is moral or immoral vary greatly from society to society, and from individual to individual. Such views are quite subjective. They stem from religious training, as well as from parental teachings and community attitudes. To permit a state to regulate behavior based solely on views of morality without requiring a showing that the regulated behavior results in adverse effects upon the public at large is in reality permitting our neighbors to dictate how we should live our lives. The Bill of Rights was meant to protect divergent views and divergent life-styles. A state should not have the power to prohibit sexual intimacy between consenting adults in the privacy of the home. The Court cannot permit an individual's life-style to be prohibited by law merely because others in the community may find that the *thought* of such a life-style offends their own view of morality. As the Model Code states, a heterogeneous society as ours must tolerate just such differences in life-style.

*B. The Constitutional Right of Privacy Should Extend to Protect Consensual Homosexual Sodomy*

1. Historical development of the right of privacy

The Supreme Court explicitly established that a right of privacy exists in the Constitution in *Griswold v. Connecticut*.<sup>145</sup> In that case, Griswold, the Director of the Planned Parenthood League, and Buxton, a licensed physician who was the League's Medical Director, were con-

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143. Schwartz, *Moral Offenses and the Model Penal Code*, 63 COLUM. L. REV. 669 (1963).

144. *Id.* at 674 (quoting MODEL PENAL CODE § 207.01 comment at 207 (Tent. Draft No. 4, 1955) (emphasis added)).

145. 381 U.S. 479 (1965).

victed of giving married persons information and advice regarding contraceptives.<sup>146</sup> By so doing, they violated a Connecticut statute which outlawed the use of any drug, article or instrument to be used for contraception.<sup>147</sup> The Court held that the Connecticut statute was unconstitutional because it violated the constitutional right of privacy.<sup>148</sup> The Court, acknowledging that the Constitution itself does not specifically mention a right of privacy,<sup>149</sup> stated that the right of marital privacy is "older than the Bill of Rights."<sup>150</sup> The Court defined the privacy right as emanating from the specific guarantees of the Bill of Rights—from "penumbras" of the Bill of Rights.<sup>151</sup> Justice Douglas, writing the majority opinion, stated that "[the] 'right to privacy [is] no less important than any other right . . . particularly reserved to the people.'"<sup>152</sup>

It would appear that the right of privacy established in *Griswold* was limited to marital privacy, since the Court rationalized its holding by stating that the idea of police searching the sacred precincts of "marital" bedrooms was repulsive to notions of privacy surrounding the marital relationship.<sup>153</sup> However, the holding in *Eisenstadt v. Baird*<sup>154</sup> indicated that the Court interpreted the right of privacy to extend to the use of contraceptives by unmarried individuals as well. In *Eisenstadt*, the Court stated, "[i]f the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted govern-

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146. *Id.* at 480.

147. *Id.* (citing CONN. GEN. STAT. §§ 53-32, 54-196 (1938)).

148. *Id.* at 485.

149. *Griswold*, 381 U.S. at 486 (Goldberg, J., concurring). "[T]he right of marital privacy . . . is not mentioned explicitly in the Constitution." *Id.* (Goldberg, J., concurring). See also *Roe v. Wade*, 410 U.S. 113, 152 (1973).

150. *Griswold*, 381 U.S. at 486.

151. *Id.* at 484.

152. *Id.* at 485 (quoting *Mapp v. Ohio*, 367 U.S. 643, 656 (1961)). Justice Goldberg, in his concurring opinion in *Griswold*, put forth the argument that the right of privacy which protects the right of couples to use contraception emanates from the ninth amendment. *Id.* at 491 (Goldberg, J., concurring). Justice Goldberg stated that the right of privacy is a fundamental right of individuals, even though it is not specifically mentioned in the Bill of Rights. He explained that the purpose of the ninth amendment is to recognize such fundamental rights which exist, even though not specifically enumerated in amendments I through VIII. *Id.* at 492-93 (Goldberg, J., concurring). See *supra* note 16.

In *Roe*, the Court stated that it believes the right of privacy emanates from an individual's liberty interest protected by the due process clause of the fourteenth amendment. *Roe*, 410 U.S. at 153. See *supra* note 17.

In *Hardwick v. Bowers*, 760 F.2d 1202 (11th Cir. 1985), *rev'd*, 106 S. Ct. 2841 (1986), the court relied on both the ninth amendment and the due process clause of the fourteenth amendment as the basis of the constitutional right of privacy. *Id.* at 1212. See *supra* text accompanying notes 16-18.

153. *Griswold*, 381 U.S. at 485-86.

154. 405 U.S. 438 (1972). See *supra* text accompanying notes 104-13.

mental intrusion . . . .”<sup>155</sup>

Again, in *Carey v. Population Services International*,<sup>156</sup> the Court held that the right of privacy extended to individuals under sixteen years of age to make decisions about contraception. In *Carey*, a New York statute which prohibited the sale of contraceptives to those under sixteen was held unconstitutional.<sup>157</sup> The *Carey* Court stated that a law which prohibited minors from using contraceptives violated the constitutional right of privacy, and that such a statute could only be upheld if the state could prove the existence of a legitimate state interest not present in the case of adults.<sup>158</sup> Since New York could not meet this burden, the Court held that the statute was unconstitutional.<sup>159</sup>

The right of privacy was further extended to protect a woman's decision to have an abortion in *Roe v. Wade*.<sup>160</sup> The *Roe* Court stated:

[The] right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.<sup>161</sup>

The right of privacy is not absolute;<sup>162</sup> it must be balanced against important state interests in regulation.<sup>163</sup> For example, though the right to choose to have an abortion is protected by the right of privacy, state regulation will be permitted as the state's interest becomes more important.<sup>164</sup> The later the term of the pregnancy, the more compelling a state's interest becomes in safeguarding the health of the mother, maintaining medical standards and protecting potential life.<sup>165</sup> The Court in *Roe* stated that regulation limiting fundamental rights, such as the right of privacy, may be justified only by a compelling state interest, and the means must be narrowly drawn to effect the state interest.<sup>166</sup> Regarding abortions, the Court concluded that the compelling point is viability; the

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155. *Eisenstadt*, 405 U.S. at 453 (emphasis in original).

156. 431 U.S. 678 (1977).

157. *Id.* at 698-99.

158. *Id.* at 693.

159. *Id.* at 700.

160. 410 U.S. 113 (1973).

161. *Id.* at 153. See *supra* note 152.

162. *Roe*, 410 U.S. at 154.

163. *Id.*

164. *Id.* at 153-54.

165. *Id.* at 154.

166. *Id.* at 155.

point at which the fetus can survive outside of the mother's womb.<sup>167</sup> It is only at this point in pregnancy that a state may totally proscribe abortion.

## 2. The right of privacy and the protection of consensual homosexual sodomy

Justice White incorrectly stated in *Bowers v. Hardwick*<sup>168</sup> that the right of privacy can only be extended to those rights deemed fundamental.<sup>169</sup> The Court's precedent contradicts this conclusion. For example, in *Stanley v. Georgia*<sup>170</sup> the Court held that a state may not prohibit an individual from possessing obscene material in the privacy of his or her own home.<sup>171</sup> The *Stanley* Court supported its conclusion by emphasizing the importance of an individual's right of privacy, yet the right to possess obscene material is not itself a fundamental right.<sup>172</sup> Writing for the majority in *Stanley*, Justice Marshall stated, "fundamental is the right to be free . . . from unwanted government intrusions into one's privacy."<sup>173</sup> Thus, the Court has concluded that although the right of privacy is fundamental, it can be extended to protect behavior which is not deemed fundamental.

*Meyer v. Nebraska*<sup>174</sup> is another privacy case which contradicts Justice White's erroneous belief in *Bowers* that the right of privacy only protects fundamental rights. There, the Court held that a state law proscribing a teacher from teaching in a language other than English violated the due process clause of the fourteenth amendment.<sup>175</sup> In *Meyer*, the right of privacy was interpreted as protecting decisions regarding the education of one's family.<sup>176</sup> However, education itself is not a fundamental right.<sup>177</sup>

Justice White contradicted prior Supreme Court cases by stating

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167. *Id.* at 163-64.

168. 106 S. Ct. 2841 (1986).

169. *Id.* at 2843-44. See *supra* text accompanying notes 33-36.

170. 394 U.S. 557 (1969).

171. *Id.* at 568.

172. *Id.* at 564-65. See *infra* text accompanying notes 215-50.

173. *Stanley*, 394 U.S. at 564.

174. 262 U.S. 390 (1923). See also *Griswold*, 381 U.S. 479, where the Court stated that the right of privacy protects a parent's decision regarding whether to educate a child in a public or private school, as well as whether the child can study a foreign language. *Id.* at 482. The Court stated that the first amendment creates such a "zone of privacy." *Id.* at 484.

175. *Meyer*, 262 U.S. at 403.

176. *Id.* at 399-400.

177. See *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 33-35 (1973) where the Court held: "Education . . . is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is [fundamental] . . ." *Id.* at 35.

that the right of privacy could not be extended to protect consensual homosexual sodomy based on the rationale that the right to engage in that behavior was not fundamental. Rather, he should have analyzed *why* the right of privacy was extended to protect certain behavior in the previous privacy cases,<sup>178</sup> and whether those reasons were present in *Bowers v. Hardwick*.<sup>179</sup> The Supreme Court's own precedent indicates that the right of privacy should be extended to protect consensual homosexual sodomy despite the fact that the right to engage in such behavior is not fundamental.

3. The right of privacy, autonomy of decision and consensual homosexual sodomy

The framing of the issue was crucial to the Court's conclusion that the right of privacy does not protect consensual homosexual sodomy. The issue in *Bowers v. Hardwick*<sup>180</sup> was not, as the majority stated, whether the United States Constitution conferred a fundamental right upon homosexuals to engage in sodomy.<sup>181</sup> Rather, the issue was whether the constitutional right of privacy should be extended to protect an individual's decision to engage in sexual intimacy—all individuals, whether married or single, heterosexual or homosexual. Based on precedent, the latter better states the constitutional issue in *Bowers*.

Contrary to Justice White's premise,<sup>182</sup> the right of privacy includes protection of an individual's right to make decisions regarding behavior *not* explicitly mentioned in the language of the Constitution, as was established in *Griswold v. Connecticut*,<sup>183</sup> *Eisenstadt v. Baird*,<sup>184</sup> *Roe v. Wade*,<sup>185</sup> and *Carey v. Population Services International*.<sup>186</sup> The right of privacy protects an individual's "liberty" interest under the fourteenth amendment of the Constitution.<sup>187</sup> In deciding the above cases, the Court's role was to interpret what "liberty" meant. In *Griswold*, *Eisenstadt*, *Roe* and *Carey*, the Court construed "liberty" to mean an individual's right to make decisions regarding such important matters as birth

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But see *infra* text accompanying notes 195-97 for a discussion of *Plyler v. Doe*, 457 U.S. 202 (1982), where the Court held that education is an important right.

178. See *infra* text accompanying notes 180-252.

179. See *infra* text accompanying notes 198-206 & 237-50.

180. 106 S. Ct. 2841.

181. *Id.* at 2843. See *supra* text accompanying note 22.

182. See *supra* text accompanying notes 33-36.

183. 381 U.S. 479. See *supra* text accompanying notes 145-53 & note 30.

184. 405 U.S. 438. See *supra* text accompanying notes 104-13, 154-55 & note 30.

185. 410 U.S. 113. See *supra* text accompanying notes 89-92, 160-67 & note 31.

186. 431 U.S. 678. See *supra* text accompanying notes 156-59 & note 30.

187. *Roe*, 410 U.S. at 153.

control and abortion. In *Meyer v. Nebraska*<sup>188</sup> and *Pierce v. Society of Sisters*<sup>189</sup> "liberty" meant an individual's right to make decisions about the education of one's children, despite the fact that, as Justice White admitted in *Bowers*, the rights recognized in *Meyer* and *Pierce* had no textual support in the language of the Constitution.<sup>190</sup>

The right of privacy protects an individual's right to make decisions regarding contraception because, as the Court stated in *Carey*, "[this decision] concerns the most intimate of human activities and relationships . . . the most private and sensitive."<sup>191</sup> In *Roe v. Wade*, the Court stated that the right of privacy protects an individual's decision regarding abortions because "[t]he detriment that the State would impose upon the pregnant woman by denying this choice altogether is apparent."<sup>192</sup> As examples of the possible detriment which could result from prohibiting a woman from having an abortion, the Court mentioned a distressful life and future psychological harm.<sup>193</sup>

Decisions regarding education are also personal. Such decisions can greatly affect an individual's entire life. While the right to education is not a fundamental right,<sup>194</sup> the Court in *Plyler v. Doe*<sup>195</sup> concluded that it is an important right, and held that a classification which deprives some group of education cannot be considered rational unless it furthers a substantial goal of the state.<sup>196</sup> Further, the Court held that the state must prove the classification is reasonably adapted to the purpose put forth by the state.<sup>197</sup>

The rights recognized in *Griswold*, *Eisenstadt*, *Roe*, *Carey* and *Plyler* can easily be analogized to the facts of *Bowers*. An individual's decision regarding sexual intimacy, where the behavior occurs between consenting adults, is certainly as private and sensitive a decision as are decisions concerning abortion and contraception. No right seems more private than the right to decide whom to be intimate with; and such a decision is certainly as important as decisions about education. As the Court stated in *Roe*, prohibiting a woman from having an abortion may

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188. 262 U.S. 390. See *supra* text accompanying notes 174-76 & note 26.

189. 268 U.S. 510 (1925). See *supra* note 26.

190. *Bowers*, 106 S. Ct. at 2844.

191. *Carey*, 431 U.S. at 685.

192. *Roe*, 410 U.S. at 153 (emphasis added).

193. *Id.*

194. See *supra* text accompanying notes 174-77 & note 177.

195. 457 U.S. 202 (Texas statute which excluded illegal alien children from attending public schools held unconstitutional).

196. *Id.* at 224.

197. *Id.* at 226.

have a harmful psychological effect.<sup>198</sup> The same reasoning can be applied to prohibiting homosexuals from engaging in sexual intimacy. An individual's sexuality has a significant effect on one's psychological well-being and self-esteem.<sup>199</sup> Denying such intimacy to any adult can negatively affect all aspects of that person's life, including one's contributions to society. The *Plyler* Court stated that education is not merely "some governmental 'benefit' indistinguishable from other forms of social welfare legislation."<sup>200</sup> Neither is an individual's decision regarding his or her own body and sexual intimacy.

Justice White's assertion in *Bowers* that it is not the Court's role to extend the right of privacy to an area never before considered by the Court is clearly incorrect. This is precisely what the Court did in *Griswold* regarding contraception, and in *Roe* regarding abortion. Hardwick claimed that consensual homosexual sodomy is protected by the constitutional right of privacy—a claim never before considered by the Court. As explained in the above discussion,<sup>201</sup> it is precisely the Court's role to interpret what "liberty" encompasses when faced with rights never before considered by the Court and, therefore, to decide whether certain behavior implicates the right of privacy. Thus, the Court could have relied on the reasoning in *Griswold* and *Roe* and extended the right of privacy to protect consensual adult sexual activity, when the behavior occurs in the privacy of the home.

Justice White stated that "announcing rights not readily identifiable in the Constitution's text involves much more than the imposition of the Justices' own choice of values."<sup>202</sup> However, the only logical explanation for the holding in *Bowers v. Hardwick* is that the Justices did indeed impose *their* own choice of values in interpreting the meaning of "liberty" under the due process clause.<sup>203</sup> Clearly, the Court did not *wish* to extend the right of privacy since the behavior protected need not be fundamental. The behavior protected need only be an important interest to implicate the right of privacy.

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198. *Roe*, 410 U.S. at 153.

199. "[T]he conduct proscribed [by sodomy laws] is central to personal identities of those singled out by [sodomy] law[s]." L. TRIBE, AMERICAN CONSTITUTIONAL LAW 943 (1978); see *id.* at 944 n.17.

200. *Plyler*, 457 U.S. at 221.

201. See *supra* text accompanying notes 182-200 and *infra* text accompanying notes 202-03.

202. *Bowers*, 106 S. Ct. at 2844.

203. Laurence H. Tribe, professor of constitutional law at Harvard Law School, spoke at the United States Law Week's Constitutional Law Conference of September 12-13, 1986. In discussing *Bowers v. Hardwick* he stated that "it seems 'unprincipled' for the Court to 'draw the line at combinations of body parts that the Justices find unpleasant to contemplate.'" *Constitutional Law Conference*, 55 U.S.L.W. 2225, 2227 (1986).



In Justice Douglas' concurring opinion in *Roe* and its companion case, *Doe v. Bolton*,<sup>204</sup> he stated, "[the] right of privacy . . . includes the privilege of an individual to plan his own affairs, for, 'outside areas of plainly harmful conduct, every American is left to shape his own life as he thinks best, do what he pleases, go where he pleases.'"<sup>205</sup> An individual's decision regarding whom to share sexual intimacy with and in what manner certainly fits within this definition. Yet the Justices in *Bowers* refused to extend the right of privacy to sodomy between consenting adult homosexuals. This decision of personal choice should not be the law's business. To be consistent with prior Supreme Court cases, Justice White should have extended the right of privacy in *Bowers v. Hardwick* to protect consensual sodomy, regarding heterosexuals and homosexuals. The essence of constitutional democracy is that it protects minorities who might make unorthodox choices.<sup>206</sup>

As the Court stated in *Roe v. Wade*, the fundamental right of privacy is not absolute.<sup>207</sup> Were the decision to engage in consensual homosexual sodomy protected by the fundamental right of privacy, the Georgia statute could then only be justified by a compelling state interest.<sup>208</sup>

The record of *Bowers v. Hardwick* indicated that Georgia itself did not even conclude that prohibition of consensual sodomy was justified by a compelling state interest. Michael Hardwick was arrested after being caught in the act of sodomy when a policeman entered his bedroom, yet the district attorney decided not to prosecute.<sup>209</sup> If Hardwick had been caught in the act of plainly harmful behavior, such as rape, murder or robbery, it is certain that the district attorney would have decided to prosecute.

Not only did the district attorney decide not to prosecute Hardwick,

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204. 410 U.S. 179 (1973) (Georgia statute which regulated abortion procedures held to violate right of privacy under due process clause).

205. *Id.* at 213 (Douglas, J., concurring) (quoting *Kent v. Dulles*, 357 U.S. 116, 126 (1958)).

206. Note, *supra* note 102, at 735.

207. *Roe*, 410 U.S. at 154. See *supra* text accompanying notes 162-67.

208. *Roe*, 410 U.S. at 154-55, 163-64. The Court in *Bowers* would not go so far as to hold that the right of privacy protects consensual sodomy in the privacy of the home, which would require regulation in this area to be justified by a compelling state interest. At the very least, the Court should have concluded that the right of consenting adults to engage in this behavior in the privacy of the home is an *important* right. The Court should have required that regulation in this area be justified by a *substantial* goal of the state, and that the state must prove that the regulation is reasonably adapted to the purpose put forth by the state, as it did in *Plyler*, 457 U.S. at 224-26. See *supra* text accompanying notes 194-200 and *infra* text accompanying notes 296-97.

209. *Bowers*, 106 S. Ct. at 2842.

but prior to Hardwick's arrest, there had been no decision regarding prosecution for private homosexual sodomy under the Georgia statute for several decades.<sup>210</sup> Georgia courts have also held that the sodomy statute did not apply to lesbian sexual activity,<sup>211</sup> even though such activity falls within the definition of the statute.<sup>212</sup> Further, Georgia did not intend to prosecute heterosexuals under the statute.<sup>213</sup> As Justice Blackmun indicated in his dissent, "[t]he history of non-enforcement suggests the moribund character today of laws criminalizing this type of private, consensual conduct."<sup>214</sup> It also suggests the lack of a compelling state interest, or surely Georgia would have been enforcing this statute over the past several decades.

#### 4. The right of privacy, privacy of the home and consensual homosexual sodomy

Justice White incorrectly concluded that *Stanley v. Georgia*<sup>215</sup> was distinguishable from *Bowers v. Hardwick*<sup>216</sup> as it related to privacy of the home. He distinguished the two cases by stating that *Stanley* was a first amendment case.<sup>217</sup> However, he ignored the fact that *Stanley* stressed the importance of protecting the sanctity and privacy of the home. Justice White should have followed the reasoning in *Stanley* and held that the sodomy statute was unconstitutional with respect to consensual sodomy occurring in the privacy of the home. The right of privacy protects both an individual's autonomy of decision<sup>218</sup> and certain behavior, such as possession of obscene material,<sup>219</sup> based on the fact that the behavior occurs in the privacy of the home.<sup>220</sup> This is so because the fourth amendment gives added importance to privacy in one's home.<sup>221</sup> As the

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210. *Id.* at 2848 n.2 (Blackmun, J., dissenting).

211. *Thompson v. Aldredge*, 187 Ga. 467, 200 S.E. 799 (1939). When *Aldredge* was decided, the statute prohibited "the carnal knowledge . . . by man with man, or in the same unnatural manner with woman." *Id.*, 200 S.E. at 800. The court interpreted these words to require the presence of a man for the statute to be implicated, stating that the statute did not apply to two women. *Id.*, 200 S.E. at 800.

212. *See supra* note 3.

213. *Bowers*, 106 S. Ct. at 2849 (Blackmun, J., dissenting); *see id.* at 2848 n.2 (Blackmun, J., dissenting).

214. *Id.* at 2848 n.2 (Blackmun, J., dissenting).

215. 394 U.S. 557.

216. 106 S. Ct. 2841.

217. *See supra* text accompanying notes 41-43.

218. *See supra* text accompanying notes 180-214.

219. *Stanley*, 394 U.S. 557. *See infra* text accompanying notes 227-30.

220. *Bowers*, 106 S. Ct. at 2850-51 (Blackmun, J., dissenting).

221. *See infra* text accompanying note 223 for the language of the fourth amendment.

Court stated in *Payton v. New York*:<sup>222</sup>

The Fourth Amendment protects the individual's privacy in a variety of settings. In none is the zone of privacy more clearly defined than when bounded by the unambiguous physical dimensions of an individual's home—a zone that finds its roots in clear and specific constitutional terms: "The right of the people to be secure in their . . . houses . . . shall not be violated."<sup>223</sup>

Hardwick, relying on the reasoning of *Stanley v. Georgia*,<sup>224</sup> argued that because the consensual behavior occurred in the privacy of his home, the Court's result should be different.<sup>225</sup> Yet Justice White distinguished *Stanley*, stating that the holding in that case was "firmly grounded in the First Amendment,"<sup>226</sup> not on the right of privacy. Justice White's assertion seems to be based more on personal views than on sound interpretation of the analysis in *Stanley*.

In *Stanley*, police officers had a search warrant to search appellant's home for evidence of bookmaking activities.<sup>227</sup> During the search, the officers found three reels of eight-millimeter films. The officers screened the films in appellant's home during the search and determined that they were obscene.<sup>228</sup> Appellant was arrested and found guilty of knowingly possessing obscene matter, in violation of Georgia law.<sup>229</sup> The Supreme Court reversed the conviction, holding that the first and fourteenth amendments "prohibit making mere private possession of obscene material a crime."<sup>230</sup>

Cases decided by the Court subsequent to *Stanley* indicate that the holding in *Stanley* was not grounded in the first amendment.<sup>231</sup> On the contrary, the Court in *Stanley* relied on the *fundamental right of privacy* for its holding. *Stanley* was specifically grounded on the rationale that possession of obscene material *in the privacy of the home* deserved added protection since state interests which apply to regulating such behavior

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222. 445 U.S. 573 (1980) (fourth amendment prohibits police from making warrantless, non-consensual entry into suspect's home to make felony arrest).

223. *Id.* at 589 (quoting U.S. CONST. amend. IV). See *Olmstead v. United States*, 277 U.S. 438 (1928). "No government agent has a right . . . to raise the curtain and peek through another's window." *Id.* at 440.

224. 394 U.S. 557.

225. *Bowers*, 106 S. Ct. at 2846.

226. *Id.*

227. *Stanley*, 394 U.S. at 558.

228. *Id.*

229. *Id.*

230. *Id.* at 568.

231. See *infra* notes 234-35.

in public simply do not exist when regulating the same behavior in the privacy of the home. The Court stated, "[w]hatever may be the justifications for other statutes regulating obscenity, we do not think they reach into the privacy of one's own home."<sup>232</sup>

Previous Supreme Court cases further support the fact that *Stanley* was not grounded in the first amendment. In *Roth v. United States*,<sup>233</sup> the Court held that "obscenity is not within the area of constitutionally protected speech or press."<sup>234</sup> This holding was affirmed in subsequent Supreme Court cases as well.<sup>235</sup> Because obscenity is not protected speech under the first amendment, *Stanley* could not have been based on the reasoning that obscenity possessed in the home is protected by the first amendment. The possession of obscene material in *Stanley* was protected because it occurred in the privacy of the home. Therefore, contrary to Justice White's assertion, *Stanley* was a privacy case, not a first amendment case.<sup>236</sup>

*Stanley v. Georgia* and *Bowers v. Hardwick* are actually very similar cases. Both dealt with behavior alleged to be immoral which occurred in the privacy of the home.<sup>237</sup> In *Bowers*, Justice White stated that the issue

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232. *Stanley*, 394 U.S. at 565.

233. 354 U.S. 476 (1957) (federal obscenity statute did not violate freedom of speech under the first amendment). See *infra* note 234.

234. *Roth*, 354 U.S. at 485. The Court in *Roth* stated that the first amendment does not protect every utterance. *Id.* at 483. Speech was meant to be protected to assure the "unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Id.* at 484. Since obscenity is without redeeming social importance, it is not protected speech under the first amendment. *Id.*

235. *Ginsberg v. New York*, 390 U.S. 629, 636-45 (1968) (operator of luncheonette barred from selling magazines containing nudity to those under 17, but not to those over 17, since state can adjust the meaning of obscenity in relation to minors); *Jacobellis v. Ohio*, 378 U.S. 184, 186-87 (1964) (Supreme Court reversed conviction for exhibition of obscene film and held that *obscenity is not protected speech*; however, film in question was not obscene); *Smith v. California*, 361 U.S. 147, 152 (1959) (city ordinance making owner of bookstore liable for sale of obscene books without knowledge of their contents violates freedom of the press). See *supra* text accompanying notes 233-34 and *infra* text accompanying notes 236-50.

236. See Note, *supra* note 102, at 690 for support of the position that *Stanley v. Georgia* is a privacy case and not a first amendment case. The author stated, "recent [Supreme Court] decisions have erased all of [Stanley's] first amendment content and transformed it into a pure privacy case." *Id.*

237. *Stanley* and *Bowers* are also similar in that both possession of obscene materials and consensual sodomy are victimless behavior when the activity occurs in the privacy of the home. See *infra* text accompanying notes 238-50. Justice White stated in *Bowers* that it would be difficult to limit constitutional protection to consensual homosexual sodomy and not extend it to adultery, incest and other sexual crimes. 106 S. Ct. at 2846. This reasoning is contrary to the reasoning in *Stanley v. Georgia*, where the Court had no difficulty limiting the holding to obscene material. The Court in *Stanley* stated, "[w]hat we have said in no way infringes upon the power of the State or Federal Government to make possession of . . . items, such as narcotics, firearms, or stolen goods, a crime." 394 U.S. at 568 n.11. Justice White could have used

before the Court was whether the United States Constitution conferred a fundamental right upon homosexuals to engage in sodomy.<sup>238</sup> However, in *Stanley*, the Court framed the issue differently. The Court did not state that the issue was whether the Constitution conferred a fundamental right upon individuals to possess obscene material in the privacy of their home. Had the issue been posed this way in *Stanley*, it is apparent that the outcome would have been entirely different. Instead, the *Stanley* Court framed the issue as whether the right of privacy protects an individual's right to possess obscene material in the privacy of the home. The issue should have been framed similarly in *Bowers*.

A more recent Supreme Court case, *Paris Adult Theatre I v. Slaton*,<sup>239</sup> further supports the view that the right of privacy was held to apply in *Stanley* because the behavior in *Stanley* occurred in the privacy of the home. Georgia filed a complaint demanding that appellants, two adult theatres and their owners and managers, be enjoined from exhibiting obscene films.<sup>240</sup> The Supreme Court affirmed its holding in *Roth v. United States*<sup>241</sup> that obscene material is not protected speech under the first amendment, and that states have a legitimate interest in regulating the exhibition of obscene material in public accommodations.<sup>242</sup> However, regarding *Stanley v. Georgia*, the Court stated:

If obscene material unprotected by the First Amendment in itself carried with it a "penumbra" of constitutionally protected privacy, this Court would not have found it necessary to decide *Stanley* on the narrow basis of the "*privacy of the home*," which was hardly more than a reaffirmation that "a man's

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similar reasoning in *Bowers* and held that the right of privacy extended to consensual homosexual sodomy, but that the holding did not extend to adultery, incest or other sexual crimes.

Furthermore, it is very easy to distinguish consensual sodomy from incest, adultery or other sexual crimes such as rape. Consensual sodomy is victimless behavior, while the others are not. Adultery, by definition of the term, always involves a spouse's infidelity to the other spouse. The spouses may have children. Adultery can lead to divorce, affecting the spouses and children, if any, and may result in victims of the act becoming dependent upon the state for support. Incest often involves children, who deserve protection from the state regarding this behavior. Incest can also disrupt family harmony, a legitimate state interest. As Justice Blackmun stated, "the Court makes no effort to explain why it has chosen to group private, consensual homosexual activity with adultery and incest rather than with private, consensual heterosexual activity by unmarried persons or . . . with oral or anal sex within marriage." *Bowers*, 106 S. Ct. at 2853-54 n.4 (Blackmun, J., dissenting).

238. *Bowers*, 106 S. Ct. at 2843.

239. 413 U.S. 49 (1973).

240. *Id.* at 52.

241. 354 U.S. 476.

242. *Paris Adult Theatre*, 413 U.S. at 69.

home is his castle.”<sup>243</sup>

The Court in *Paris Adult Theatre* held that the right of privacy cases<sup>244</sup> did not apply since there was no “fundamental privacy right ‘implicit in the concept of ordered liberty’ to watch obscene movies in places of public accommodations.”<sup>245</sup> The same reasoning was applied in *Bowers v. Hardwick*, where the Court held that the right of privacy should not be extended because there was no fundamental right to engage in consensual homosexual sodomy.<sup>246</sup> However, in *Stanley* the Court extended the right of privacy to protect the possession of obscene material in the privacy of one’s home. It seems doubtful, as the *Bowers* Court’s reasoning would indicate, that the Court believed that the Constitution bestowed a fundamental right upon individuals to possess obscene material in one’s home. Rather, the logical conclusion is that the *Stanley* Court intended that certain behavior occurring in the privacy of the home receive added constitutional protection, more protection than the same behavior deserves when occurring in public. Based on the fundamental right of privacy, in addition to possession of obscene material, the right of consenting adults to engage in sodomy also deserves such added protection when this behavior occurs in the privacy of the home.

Of course the fact that behavior occurs in the privacy of the home does not of itself automatically render that behavior deserving of constitutional protection. Not all behavior deserves such protection. Where the state has a legitimate interest in the safety of its citizens, prohibition of behavior in the privacy of the home is justified. Prohibitions against crimes of violence, such as murder and robbery, must be enforced regardless of where the behavior occurs. Such behavior is not victimless behavior, and therefore, the state’s interest in protecting its citizens from harm is equally strong whether the act takes place in public or private. The same can be said for sexual crimes, such as rape, incest and adultery,<sup>247</sup> as these too are not victimless acts—they result in harm. Prohibition of the possession of dangerous drugs and weapons in the home can also be justified. Here too, an individual under the influence of drugs may leave his home, drive, and cause harm to others.

Victimless behavior, however, such as possession of obscene material in the home, *does* deserve added protection. The state’s interest in regulating this type of behavior differs, depending on whether the act

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243. *Id.* at 66 (emphasis added).

244. *See supra* notes 26-31.

245. *Paris Adult Theatre*, 413 U.S. at 66.

246. *Bowers*, 106 S. Ct. at 2844.

247. *See supra* note 237.

occurs in public or in private. Possession of obscene material in the home does not result in harm to others.

Consensual adult homosexual sodomy in the privacy of the home is also victimless behavior. Therefore, it too deserves to be treated differently than the same behavior occurring in public. The Court in *Griswold v. Connecticut*<sup>248</sup> concluded that police may not enter the "sacred precincts" of the marital bedroom to search for contraceptives, because the search would violate an individual's right of privacy.<sup>249</sup> However, the state does have a legitimate interest in prohibiting marital sexual activity in public. This reasoning also applies to consensual sodomy. When the behavior occurs in the privacy of the home, no harm occurs to members of the public. Therefore, there is no justification to permit police to enter an individual's bedroom to investigate sexual activity. However, the state does have a legitimate interest in prohibiting this same behavior in public.

Justice White's holding in *Bowers* was inconsistent with *Stanley v. Georgia*, because he did not recognize this distinction. The *Bowers* majority should have held that consensual sodomy occurring in the privacy of the home is protected behavior under the constitutional right of privacy. The Court could have further held that the same behavior occurring in public is within a state's power to regulate. This holding would have been constitutionally sound and in line with prior precedent.

Further support for this interpretation of the right of privacy is found in a remark made by Justice Marshall. To justify the holding in *Stanley*, he quoted an early Supreme Court case:

"The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of a man's spiritual nature, of his feelings and of his intellect . . . . They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone—most comprehensive of rights and the right most valued by civilized man."<sup>250</sup>

Justice White ignored this precedent when he wrote the majority opinion in *Bowers v. Hardwick*. A better analysis was put forth by Justice Blackmun. He stated that the issue in *Bowers* was "the right to be let

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248. 381 U.S. 479.

249. *Id.* at 485-86. See *supra* text accompanying notes 145-53.

250. *Stanley*, 394 U.S. at 564 (quoting *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)).

alone,' ”<sup>251</sup> a much less result oriented phrasing of the issue, and concluded that the Georgia sodomy statute violated the United States Constitution.<sup>252</sup> This conclusion is much more consistent with Supreme Court precedent.

*C. The Georgia Sodomy Statute and the Equal Protection Clause of the Fourteenth Amendment*

The majority in *Bowers v. Hardwick*<sup>253</sup> did not address the possibility that the Georgia sodomy statute violated the equal protection clause. Justice Blackmun, however, did mention that Hardwick may have been successful with an equal protection challenge;<sup>254</sup> but Justice Blackmun did not discuss the issue either.<sup>255</sup> Since the majority in *Bowers* refused to extend the right of privacy to protect consensual adult homosexual sodomy occurring in the privacy of the home, an equal protection analysis is important.

The fourteenth amendment of the United States Constitution states, “[n]o State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws.”<sup>256</sup> Equal protection prohibits the disparity in treatment between classes of individuals whose situations are similar. “A reasonable classification is one which includes all persons who are similarly situated with respect to the purpose of the law.”<sup>257</sup> The Court uses three standards of review when analyzing whether a statute violates the equal protection clause.

1. Rational basis

When economic or social legislation, which discriminates against business interests, is challenged as violating the equal protection clause, the Court uses a standard of review known as the rational basis test. For a statute to be upheld under this standard, (1) the classification must be based on a legitimate state interest, and (2) the classification must rationally serve the intended purpose.<sup>258</sup>

One example of an early case where the Court applied the modern

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251. *Bowers*, 106 S. Ct. at 2848 (Blackmun, J., dissenting) (quoting *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)).

252. *Id.* at 2856 (Blackmun, J., dissenting).

253. 106 S. Ct. 2841 (1986).

254. *Id.* at 2850 & n.2 (1986) (Blackmun, J., dissenting).

255. See *supra* text accompanying notes 59-61.

256. U.S. CONST. amend. XIV, § 1.

257. Tussman & tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341, 346 (1949).

258. L. TRIBE, *supra* note 199, at 995.



rational basis test is *United States v. Carolene Products Co.*<sup>259</sup> There, the "Filled Milk Act" of Congress was challenged as being unconstitutional.<sup>260</sup> The act prohibited the shipment of skimmed milk containing any fat or oil other than milk fat in interstate commerce. The Court deferred to Congress' purpose and upheld the act, stating:

[T]he existence of facts supporting the legislative judgment is to be presumed, for regulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless in light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators.<sup>261</sup>

The rational basis test provides a very low standard of review. Therefore, most statutes analyzed under the rational basis standard have been upheld.<sup>262</sup> An example of a more recent Supreme Court case which applied the rational basis test where economic legislation was challenged is *New Orleans v. Dukes*.<sup>263</sup> There, a city ordinance prohibited vendors from selling food from pushcarts in an area called the *Vieux Carre* (also known as the French Quarter) unless they had been operating within that area for eight years or more prior to January 1, 1972.<sup>264</sup> The Court upheld the ordinance, stating that the city's purpose was to "'preserve the appearance and custom valued by the Quarter's residents and attractive to tourists.'"<sup>265</sup> Therefore, the ordinance was rationally related to the purpose.<sup>266</sup>

In *Dukes*, the Court held that, "[w]hen . . . economic regulation is

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259. 304 U.S. 144 (1938).

260. *Id.* at 145-46.

261. *Id.* at 152 (footnote omitted).

262. See *infra* note 266 for examples of cases decided under the rational basis standard.

263. 427 U.S. 297 (1976).

264. *Id.* at 298.

265. *Id.* at 304 (quoting *Dukes v. New Orleans*, 501 F.2d 706, 709 (5th Cir. 1974)).

266. *Id.* at 305. For other cases challenging economic or social legislation where the Court used the rational basis test and upheld the regulation, see *United States R.R. Retirement Bd. v. Fritz*, 449 U.S. 166 (1980) (section of Railroad Retirement Act, which, as restructured by Congress in 1974, divided employees into several groups for retirement benefits, did not violate equal protection); *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955) (subjecting opticians to regulation while exempting all sellers of ready to wear glasses did not violate equal protection); *Railway Express Agency v. New York*, 336 U.S. 106 (1949) (New York City regulation forbidding advertising on vehicles unless the advertisement was for product being sold by the owner of the vehicle did not violate equal protection). The only case in the last half century to invalidate wholly economic legislation was *Morey v. Doud*, 354 U.S. 457 (1957) (Illinois statute which imposed licensing requirement on firms issuing money orders other than American Express money orders violated equal protection). *Morey* was overruled in *Dukes*, 427 U.S. 297, 306 (1974).

challenged . . . as violating the Equal Protection Clause, this Court consistently defers to legislative determinations as to the desirability of particular statutory discriminations."<sup>267</sup> The Court is deferential regarding state economic legislation which discriminates against business interests based on the belief in judicial restraint.<sup>268</sup> The Court has stated that it does not want to be a "superlegislature" judging the wisdom of the state's legislative policy determinations.<sup>269</sup> Only recently has the Court applied the rational basis test and struck down legislation as violating the equal protection clause.<sup>270</sup>

## 2. Strict scrutiny

The strict scrutiny standard requires that the classification be justified by a *compelling* state interest, which is " 'necessary . . . to the accomplishment' of its legitimate purpose." <sup>271</sup> The Court first addressed the need for a higher standard of review in a footnote in *United States v. Carolene Products Co.*<sup>272</sup> In *Carolene*, Justice Stone discussed the possible necessity of a "stricter" standard to evaluate classifications which are within a specific prohibition of the Constitution.<sup>273</sup> He stated:

There may be a narrower scope for operation . . . when legislation [is] . . .

. . . .

. . . directed at particular religious . . . or racial minorities, whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.<sup>274</sup>

The Court adopted the suggestion in the *Carolene* footnote and applies strict scrutiny when a legislative classification burdens a suspect

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267. *Dukes*, 427 U.S. at 303.

268. *L. TRIBE*, *supra* note 199, at 995.

269. *Dukes*, 427 U.S. at 303.

270. See *infra* text accompanying notes 315-25 for a discussion of *City of Cleburne v. Cleburne Living Center*, 105 S. Ct. 3249 (1985), where the Supreme Court invalidated a statute employing the rational basis standard. See also *Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869 (1985) (Alabama tax statute favoring domestic business violated equal protection under rational basis standard, where state interest was not legitimate).

271. *Palmore v. Sidoti*, 466 U.S. 429, 432-33 (1984) (quoting *McLaughlin v. Florida*, 379 U.S. 184, 196 (1964)) (Court decision determining child custody on basis of race violates equal protection).

272. 304 U.S. 144.

273. *Id.* at 152 n.4.

274. *Id.* (citation omitted).

class—defined as a discrete, insular group “saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.”<sup>275</sup> Suspect classes include classifications based on race<sup>276</sup> and alienage.<sup>277</sup>

Strict scrutiny is necessary because, unlike economic legislation where individuals can pressure the legislators to correct abuse, the political process may not be responsive when legislation exists which disadvantages a suspect class. A suspect class, by its definition, is a minority, and the political process is based on majority rule.

The strict scrutiny standard is also applied when a classification deprives, infringes or interferes with a fundamental right or liberty.<sup>278</sup> For example, in *Shapiro v. Thompson*<sup>279</sup> the Court held that a statute which denied welfare assistance to residents who had not resided within the jurisdiction for at least one year prior to their application for assistance was in violation of the equal protection clause.<sup>280</sup> The Court concluded that the statute interfered with the fundamental right to travel.<sup>281</sup> The Court stated that “any classification which serves to penalize the exercise of [a fundamental] right, unless shown to be necessary to promote a *compelling* governmental interest, is unconstitutional . . . .”<sup>282</sup>

Contrary to classifications analyzed under rational basis, those analyzed under strict scrutiny are nearly always struck down.<sup>283</sup> In fact, in only one case, *Korematsu v. United States*,<sup>284</sup> was a classification based

275. *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973) (Texas school district system which relied on local property taxes, thereby favoring wealthy districts, did not violate equal protection since education is not a fundamental right and the system did not burden a suspect class). See *supra* note 177.

276. See *Palmore*, 466 U.S. 429 (1984); *Loving v. Virginia*, 388 U.S. 1 (1967) (statute prohibiting marriage based on racial classifications held unconstitutional); *Brown v. Board of Educ.*, 347 U.S. 483 (1954) (Court held that segregation in schools is unconstitutional; separate is not equal regarding education). See *supra* text accompanying notes 93-98 for a discussion of *Loving*.

277. *Graham v. Richardson*, 403 U.S. 365 (1971) (statute excluding resident aliens from receipt of welfare benefits violated equal protection). Cf. *Bernal v. Fainter*, 467 U.S. 216 (1984) (aliens are not a suspect class in all contexts).

278. *San Antonio*, 411 U.S. 1 (citing *Dunn v. Blumstein*, 405 U.S. 330 (1972); *Shapiro v. Thompson*, 394 U.S. 618 (1969)); *Skinner v. Oklahoma*, 316 U.S. 535 (1942)).

279. 394 U.S. 618 (1969).

280. *Id.* at 627.

281. *Id.* at 630-31.

282. *Id.* at 634 (emphasis in original).

283. *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 319 (1976) (Marshall, J., dissenting). “If a statute is subject to strict scrutiny, the statute always, or nearly always, is struck down.” *Id.*

284. 323 U.S. 214 (1944).

on race upheld by the Court as constitutional. In *Korematsu*, a military order excluded people of Japanese ancestry from certain west coast areas, whether or not they were United States citizens.<sup>285</sup> The Court applied strict scrutiny since the order classified based on race, and upheld the order as constitutional,<sup>286</sup> stating that the compelling interest was national security. However, this was a very unusual case, and its holding very limited, because it occurred while the United States was at war and had recently been attacked by Japan.

### 3. Intermediate scrutiny

As stated above, classifications analyzed under rational basis were almost always upheld,<sup>287</sup> and those analyzed under strict scrutiny were consistently struck down.<sup>288</sup> Realizing this, the Court acknowledged that a standard of review somewhere between these extremes was necessary.<sup>289</sup> Though the Court did not itself articulate that it was using an intermediate standard,<sup>290</sup> the Court did apply this standard when focusing on the character of the classification, the importance of the government benefit being deprived, and the state interest.<sup>291</sup> To withstand constitutional analysis under this intermediate standard, the classification "must serve important governmental objectives and must be substantially related to achievement of those objectives."<sup>292</sup>

The Court has applied this standard to classifications based on gender<sup>293</sup> and illegitimacy.<sup>294</sup> The Court has also applied this standard

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285. *Id.* at 215-16.

286. *Id.* at 219.

287. See cases cited *supra* at note 266.

288. See *supra* text accompanying notes 283-86.

289. L. TRIBE, *supra* note 199, at 1082. In the famous *Bakke* case, Justice Brennan stated, "the fact that this case does not fit neatly into our prior analytic framework for race cases does not mean that it should be analyzed by applying the very loose rational-basis standard . . ." University of Cal. Regents v. Bakke, 438 U.S. 265, 358 (1978) (Brennan, J., dissenting) (footnote omitted). In *Bakke*, the Court held that a special admissions program in a medical school which favored disadvantaged minorities violated equal protection.

290. *Murgia*, 427 U.S. at 318 (Marshall, J., dissenting). "[T]he rigid two-tiered model [strict scrutiny and rational basis] still holds sway as the Court's articulated description of the equal protection test." *Id.* (Marshall, J., dissenting).

291. *Id.* (Marshall, J., dissenting).

292. *Craig v. Boren*, 429 U.S. 190, 197 (1976). See *infra* note 293 for cases where the Court applied the intermediate scrutiny standard.

293. See *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718 (1982) (state statute which excluded males from enrolling in state-supported professional nursing school held unconstitutional); *Michael M. v. Superior Ct.*, 450 U.S. 464 (1981) (California's statutory rape law which made men alone criminally liable held valid—justification offered by the state to prevent illegitimate teenage pregnancy was entitled to great deference); *Craig*, 429 U.S. 190 (statute which prohibited the sale of alcoholic beverages to males under the age of 21 and females

when analyzing a classification which burdens an important, though not fundamental, right, such as education.<sup>295</sup> For example, in *Plyler v. Doe*<sup>296</sup> the Court held unconstitutional a Texas statute which excluded illegal alien children from attending public school. Since the statute deprived those children of education, an important right, and the exclusion of illegal alien children from public schools was not justified by a substantial state interest, the statute violated equal protection.<sup>297</sup>

Unlike rational basis and strict scrutiny, where the Court's outcome is often predictable, statutes subject to intermediate scrutiny have been both upheld and invalidated.<sup>298</sup>

#### 4. Analysis of the Georgia statute under the equal protection clause of the fourteenth amendment

In *Bowers v. Hardwick*<sup>299</sup> an equal protection analysis is necessary because the Georgia statute, as applied, treats male homosexuals differently than heterosexuals and differently than lesbians,<sup>300</sup> even though the statute itself is gender-neutral.<sup>301</sup> One question to address is which equal protection standard of review is proper: rational basis, strict scrutiny, or intermediate scrutiny.

It has been argued that homosexuals are a suspect class, deserving strict scrutiny.<sup>302</sup> In fact, homosexuals satisfy the criteria of suspect class stated in *Matthews v. Lucas*: "a characteristic determined by causes not within the control of the . . . individual, and [which] bears no relation

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under the age of 18 held invalid); *Kahn v. Shevin*, 416 U.S. 351 (1974) (Florida statute granting widows, but not widowers, a \$500 property tax exemption upheld); *Reed v. Reed*, 404 U.S. 71 (1971) (Idaho statute choosing males over females to administer intestate estate violated equal protection).

294. *Mills v. Habluetzel*, 456 U.S. 91 (1982) (Texas statute requiring that paternity suit be brought before illegitimate child is one year old violates equal protection); see also *Lalli v. Lalli*, 439 U.S. 259 (1978) (New York statute which required that illegitimate children, but not legitimate children, who would inherit from their fathers by intestate succession provide proof of paternity violated equal protection). Although "classifications based on illegitimacy are not subject to 'strict scrutiny,' they nevertheless are invalid under the Fourteenth Amendment if they are not substantially related to permissible state interests." *Id.* at 265.

295. *Plyler v. Doe*, 457 U.S. 202 (1982). See *supra* text accompanying notes 194-97 and *infra* text accompanying notes 296-97.

296. 457 U.S. 202.

297. *Id.* at 230.

298. See cases cited *supra* at note 293.

299. 106 S. Ct. 2841.

300. See *supra* text accompanying notes 211-13.

301. See *supra* note 3.

302. See Note, *The Constitutional Status of Sexual Orientation: Homosexuality as a Suspect Classification*, 98 HARV. L. REV. 1285 (1985).

to the individual's ability to participate in and contribute to society."<sup>303</sup> However, rather than extending the suspect classification category to include those other than race and alienage, the Court has "apparently lost interest in recognizing further . . . 'suspect' classes."<sup>304</sup> For example, in *Frontiero v. Richardson*,<sup>305</sup> the Court stated that women were a suspect class.<sup>306</sup> On the other hand, in *Craig v. Boren*<sup>307</sup> the Court retreated from this position and used intermediate scrutiny regarding gender classifications.<sup>308</sup> The Court has retreated in the same manner in cases involving alienage classifications. In early cases, it concluded that aliens were a suspect class,<sup>309</sup> but later held that in certain contexts aliens were not a suspect class.<sup>310</sup>

It could be argued that classifications based on homosexuality, like those based on gender, deserve intermediate scrutiny, since homosexuals, like women, have been subject to a long history of purposeful discrimination. However, as with suspect classes, the Court in recent cases has refused to extend the quasi-suspect status to new groups.<sup>311</sup> Since the Court has not been willing to extend the suspect or quasi-suspect status to new groups,<sup>312</sup> it seems unlikely that homosexuals would be an exception. However, the Georgia statute as applied violates the equal protection clause even under the rational basis standard.

Under the rational basis standard, for a statute to be upheld it must be based on a legitimate state interest and the means must be rationally related to the purpose of the statute.<sup>313</sup> The Court itself has stated, "the pertinent inquiry is whether the classification . . . advances legitimate

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303. 427 U.S. 495, 505 (1976) (social security statutes regarding survival benefits with different burden for illegitimates regarding dependency requirements held not to violate equal protection). See *L. TRIBE*, *supra* note 199, at 944 n.17; see also *J.H. ELY*, *supra* note 121, at 163. "It is a combination of the factors of prejudice and hideability that renders classifications that disadvantage homosexuals suspicious." *Id.*

304. *Murgia*, 427 U.S. at 318-19 (Marshall, J., dissenting).

305. 411 U.S. 677 (1973) (federal statute declaring that spouses of male members of the armed services, but not spouses of female members, were dependents regarding military benefits, violated equal protection).

306. *Id.* at 682.

307. 429 U.S. 190.

308. *Id.* at 197-99. See *supra* note 293.

309. *Graham*, 403 U.S. 365. See *supra* note 277.

310. *Bernal*, 467 U.S. 216. See *supra* note 277.

311. *Cleburne*, 105 S. Ct. 3249 (intermediate status not extended to mentally retarded); *Schweiker v. Wilson*, 450 U.S. 221 (1981) (suspect or quasi-suspect status not extended to mentally ill); *Murgia*, 427 U.S. 307 (statute requiring mandatory retirement of state police officers at age 50 did not violate equal protection under rational basis, and age classification did not require intermediate scrutiny).

312. See *supra* note 311 and accompanying text.

313. See *supra* text accompanying note 258.

legislative goals in a rational fashion . . . although this rational-basis standard is 'not a toothless one.'"<sup>314</sup>

Recent cases indicate that the Court is moving away from total deference to the legislative determinations generally applied under the rational basis test.<sup>315</sup> *City of Cleburne v. Cleburne Living Center*<sup>316</sup> is an example of a recent Supreme Court case which struck down legislation under the rational basis standard. In *Cleburne*, the City of Cleburne denied a special use permit for the operation of a group home, which was going to be used to house thirteen retarded men and women.<sup>317</sup> Under the city zoning regulations, a special use permit was required for "hospitals for the insane and feeble-minded."<sup>318</sup> Cleburne Living Center filed suit against the city, alleging that the zoning ordinance violated its equal protection rights on its face and as applied, because the statute discriminated against the mentally retarded.<sup>319</sup> The district court held that the ordinance was constitutional since mental retardation was neither a suspect nor a quasi-suspect classification.<sup>320</sup> The Fifth Circuit Court of Appeals reversed, holding that mental retardation was a quasi-suspect class.<sup>321</sup> The Supreme Court granted certiorari,<sup>322</sup> and vacated the holding of the Fifth Circuit that the mentally retarded were a quasi-suspect class.<sup>323</sup> However, employing the rational basis standard, the Court stated, "[b]ecause in our view the record does not reveal any rational basis for believing that the . . . home would pose any special threat to the city's legitimate interests, we affirm the judgment below insofar as it

314. *Schweiker*, 450 U.S. at 234 (quoting *Mathews v. Lucas*, 427 U.S. 495, 510 (1976)). See *supra* notes 303 and 311.

315. See *Murgia*, 427 U.S. at 321 (Marshall, J., dissenting): "[T]he Court has rejected, albeit, *sub silentio*, its most deferential statements of the rationality standard in assessing the validity under the Equal Protection Clause of much noneconomic legislation."

316. 105 S. Ct. 3249. See generally Note, *A Changing Equal Protection Standard? The Supreme Court's Application of a Heightened Rational Basis Test in City of Cleburne v. Cleburne Living Center*, 20 LOY. L.A.L. REV. 921 (1987).

317. *Id.* at 3252.

318. *Id.*

319. *Id.* at 3253.

320. *Id.*

321. *Cleburne Living Center v. City of Cleburne*, 726 F.2d 191, 197 (5th Cir. 1984), *aff'd on other grounds*, 105 S. Ct. 3249 (1985).

322. *City of Cleburne v. Cleburne Living Center*, 105 S. Ct. 427 (1984).

323. *Cleburne*, 105 S. Ct. at 3257. The Court stated:

[I]f the large and amorphous class of the mentally retarded were deemed quasi-suspect for the reasons given by the Court of Appeals, it would be difficult to find a principled way to distinguish a variety of other groups who have perhaps immutable disabilities setting them off from others, who cannot themselves mandate the desired legislative responses, and who can claim some degree of prejudice from at least part of the public at large.

*Id.* at 3257-58.

holds the ordinance invalid as applied in this case.”<sup>324</sup> The statute did not survive rational basis, because the interests put forth by the city were not rationally related to the statute as applied in that case.<sup>325</sup>

Although the rational basis standard, as it was applied in *Cleburne*, is an exception to the general rational basis test, it seems that the Court should apply the same rational basis standard to *Bowers v. Hardwick*. As discussed above, the Court is very deferential regarding economic legislative classifications which burden business interests.<sup>326</sup> However, it seems that the Court was less deferential in *Cleburne* because the classification burdened a particular minority—the mentally retarded, and the interest affected—housing, was more important than purely economic interests. As Justice Marshall stated in *Massachusetts Board of Retirement v. Murgia*,<sup>327</sup> “time and time again, met with cases touching upon the prized rights and burdened classes of our society, the Court has acted only after a reasonably probing look at the legislative goals and means, and at the significance of the personal rights and interests invaded.”<sup>328</sup>

The Georgia sodomy statute, as applied, burdens homosexuals. Homosexuals are a minority group with a long history of purposeful discrimination. The statute also infringes upon an important right: the right of an adult to decide whom to be sexually intimate with and in what manner, when the activity occurs in the privacy of the home. Therefore, since the Georgia statute is not merely burdening economic business interests, the Court’s heightened rational basis standard which was used in *Cleburne*, should be applied when analyzing the constitutionality of the sodomy statute in *Bowers*. Under the standard used in *Cleburne*, Georgia’s sodomy statute violates equal protection and is, therefore, unconstitutional.

The Georgia legislature intended for the sodomy statute to apply to all persons, not solely to male homosexuals.<sup>329</sup> The statute itself does not

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324. *Id.* at 3259.

325. *Id.* at 3259-60. The city put forth several interests to justify the ordinance: (1) to avoid negative attitudes of those living near the boarding house and to avoid fear of the mentally retarded by the elderly residents; (2) to avoid harassment of the mentally retarded by students from a nearby junior high school; (3) to avoid the possibility of a flood; (4) to avoid conflict over legal issues which may arise from actions taken by the mentally retarded; and (5) to avoid overcrowding in the home. *Id.*

326. See *supra* text accompanying notes 258-70 & note 266.

327. 427 U.S. 307.

328. *Id.* at 320 (Marshall, J., dissenting). “[T]he Court has rejected its most deferential statements of the rationality standard in assessing the validity under the Equal Protection Clause of much noneconomic legislation.” *Id.* at 321 (Marshall, J., dissenting).

329. See *supra* text accompanying notes 211-13.



classify based on gender.<sup>330</sup> The statute, as it was worded in 1933,<sup>331</sup> was meant to apply to heterosexuals as well as homosexuals, but the Georgia courts held that the statute did not apply to heterosexual cunnilingus<sup>332</sup> or to lesbian sexual activity.<sup>333</sup> The Georgia legislature then amended the statute in 1968<sup>334</sup> to proscribe "any sexual act involving the sex organs of one person and the mouth or anus of another."<sup>335</sup> Since the statute itself does not mention gender, it includes heterosexual activity as well as lesbian activity. Yet in *Bowers v. Hardwick*, the State of Georgia stated that it did not have any interest in prosecuting heterosexuals.<sup>336</sup> Therefore, Georgia is applying the statute in a discriminatory manner, contrary to the original intent of the Georgia legislature. To pass the rational basis test, a legitimate state interest must exist to justify the unequal application of the statute,<sup>337</sup> and the means must be rationally related to the purpose of the statute.<sup>338</sup>

Georgia argued that homosexual sodomy "may have serious adverse consequences for 'the general public health and welfare,' such as spreading communicable diseases or fostering other criminal activity."<sup>339</sup> These are not valid arguments. As far as "other criminal activity," is concerned, "[t]here is no evidence to support, and *much to refute*, the theory that those who deviate from conventional sexual morality are in other ways hostile to society."<sup>340</sup> Regarding the spreading of communicable diseases, where diseases are transmitted through sexual contact, the

330. See *supra* note 3.

331. The statute proscribed "[t]he carnal knowledge by man with man or in the same unnatural manner with woman." *Thompson v. Aldredge*, 187 Ga. 467, 467, 200 S.E. 799, 800 (1939) (quoting GA. CODE ANN. § 26-5901 (1933)).

332. *Riley v. Garrett*, 219 Ga. 345, 133 S.E.2d 367 (1963); see *Bowers*, 106 S. Ct. at 2849 n.1 (Blackmun, J., dissenting).

333. *Aldredge*, 187 Ga. 467, 200 S.E. 799. See *Bowers*, 106 S. Ct. at 2849 n.1 (Blackmun, J., dissenting).

334. *Bowers*, 106 S. Ct. at 2849 n.1 (Blackmun, J., dissenting). Justice Blackmun stated that "Georgia passed the act specific statute currently in force 'perhaps in response to the restrictive court decisions such as *Riley*.'" *Id.* (Blackmun, J., dissenting) (quoting Note, *The Crimes Against Nature*, J. PUB. L. 159, 167 n.47 (1967)).

335. GA. CODE ANN. § 16-6-2(a) (1984).

336. *Bowers*, 106 S. Ct. at 2849 (Blackmun, J., dissenting) (quoting transcript of oral argument).

337. In *Doe v. Commonwealth*, 403 F. Supp. 1199 (E.D. Va. 1975), *aff'd*, 425 U.S. 901 (1976), the state of Virginia failed to introduce any evidence *whatever* regarding interests furthered by the Virginia sodomy law. See L. TRIBE, *supra* note 199, at 942 (emphasis added).

338. If the statute were worded so that it specifically criminalized sodomy only by homosexual men, the same analysis would apply. However, instead of being a violation of equal protection as applied, it would be a violation on its face.

339. *Bowers*, 106 S. Ct. at 2853 (Blackmun, J., dissenting) (quoting Brief for Petitioner).

340. H.L.A. HART, *supra* note 87, at 51 (emphasis added).

risk of such transmission is the same whether the sexual activity occurs between heterosexuals or homosexuals.<sup>341</sup> Therefore, applying the statute to only male homosexuals is under-inclusive<sup>342</sup> and violates that group's equal protection rights.

Further support for the absence of a legitimate state interest can be found in the lack of any prosecution under the statute. As stated above,<sup>343</sup> there had been no prosecution under the Georgia sodomy statute for several decades. Even in Hardwick's case, the attorney general decided not to prosecute.<sup>344</sup>

As demonstrated in previous Supreme Court cases, "mere negative attitudes, or fear, unsubstantiated by factors which are properly cognizable . . . are not permissible bases for [disparate treatment] . . . 'Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.'"<sup>345</sup> Therefore, selective application of the Georgia sodomy statute cannot be justified by negative attitudes about homosexuality.

There is no proof that consensual adult homosexual sodomy occurring in the privacy of the home adversely affects any individuals. In fact, the Model Penal Code<sup>346</sup> has stated just the opposite view: "[N]o harm to the secular interests of the community is involved in atypical sex prac-

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341. It was reported in *The Washington Post* that the initial vote in *Bowers v. Hardwick* was five to four in favor of Hardwick, but that Justice Powell subsequently changed his mind. Robinson, *Sodomy and the Supreme Court*, COMMENTARY, Oct. 1986, at 57, 60. In the *St. Louis Post-Dispatch*, a columnist speculated that the Georgia sodomy statute was upheld due to its perceived prevention of the spread of Acquired Immune Deficiency Syndrome (AIDS). *Id.*

AIDS is the terminal stage of a viral infection and the majority of AIDS victims are homosexual men. *Id.* at 57-58. However, AIDS is spread by sexual contact; AIDS is *not* a homosexual disease. Contracting AIDS "has nothing to do with whether you are black, homosexual or Haitian." McAuliffe, *AIDS: At the Dawn of Fear*, U.S. NEWS AND WORLD REPORT, Jan. 12, 1987, at 62. "The disease of *them* . . . presumed just a few years ago to be confined to homosexuals, Haitians and hemophiliacs is now a plague of the mainstream, finding fertile growth among heterosexuals." *Id.* at 60 (quoting Dr. June Osborn, Dean of the School of Public Health at the University of Michigan) (emphasis in original). A full discussion of AIDS is beyond the scope of this Note.

342. The term "under-inclusive" when used in equal protection analysis means that the classification does not include all who are similarly situated regarding the purpose of the statute. Therefore, the group burdened by the classification is less than the total which should be included within the group to achieve the purpose of the classification. L. TRIBE, *supra* note 199, at 997.

343. See *supra* text accompanying notes 209-14.

344. See *supra* text accompanying notes 8 & 209.

345. *Cleburne*, 105 S. Ct. at 3259 (quoting *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984)).

346. MODEL PENAL CODE (Tent. Draft 1955).

tice in private between consenting adult partners."<sup>347</sup>

A legitimate state interest has not been stated and does not exist to justify the discriminatory application of the Georgia sodomy statute. Therefore, the statute, as applied, violates equal protection even under the rational basis standard.

#### IV. CONCLUSION

In *Bowers v. Hardwick*,<sup>348</sup> the Court was faced with the issue of whether Georgia's sodomy statute was constitutional. The Court, relying on history, morality and religion, held that the statute was constitutional. As has been shown, the long history of a statute's existence, morality alone, and religion, are insufficient bases for constitutional analysis.

The Court also held that the constitutional right of privacy did not extend to consensual homosexual sodomy occurring in the privacy of the home. Though the statute was gender-neutral, the Court did not address whether consensual heterosexual sodomy implicated the right of privacy. The Court's reasoning contradicted the majority of privacy cases previously decided by the Court.

Although the Court did not address equal protection, the Georgia sodomy statute, as applied, violates the equal protection clause of the fourteenth amendment. Georgia is applying the gender-neutral sodomy statute to only male homosexuals; however, no legitimate state interest exists to justify this discriminatory application.

Justice White, writing for the majority, stated that "announcing rights not readily identifiable in the Constitution's text involves much more than the imposition of the Justices' own choice of values."<sup>349</sup> It seems that the holding in *Bowers* was based on the Justices' own prejudicial view against homosexuality. The reasoning relied upon by the Court to justify the holding that Georgia's sodomy statute was constitutional is contrary to the Court's prior notions of liberty and privacy.

*Randi Maurer*

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347. H.L.A. HART, *supra* note 87, at 15 (quoting MODEL PENAL CODE (Tent. Draft 1955)).

348. 106 S. Ct. 2841 (1986).

349. *Id.* at 2844.